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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No._____

AUBREY DENNIS ADAMS, Petitioner,

v.

LOUIS L. WAINWRIGHT
and **JIM SMITH**, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER MR. ADAMS' CONVICTION AND SENTENCE OF DEATH MAY REST UPON A NONEXISTENT CRIME AND/OR A CRIME FOUND TO BE UNCONSTITUTIONAL, IN VIOLATION OF THE FOURTEENTH AMENDMENT, AND WHETHER THE DECISION OF THE CIRCUIT COURT THUS CONFLICTS WITH STROMBERG v. CALIFORNIA, 283 U.S. 359 (1931).

II. WHETHER THERE WAS A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY WAS INFORMED THAT MR. ADAMS' COMMISSION OF CERTAIN NAMED FELONIES COULD SUPPORT A FELONY-MURDER CONVICTION AND COULD BE THE PREDICATE FOR A FINDING OF STATUTORY AGGRAVATING CIRCUMSTANCES, BUT THE JURY WAS NOT INSTRUCTED ON THE ELEMENTS OF THE NAMED FELONIES. WHETHER THE CIRCUIT COURT'S RESOLUTION OF THESE ISSUES CONFLICTS WITH THIS COURT'S DECISION IN HENDERSON V. KIBBE, 431 U.S. 145 (1977), AND THIS COURT'S REQUIREMENT OF RELIABILITY IN CAPITAL PROCEEDINGS.

III. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE APPLICATION OF THE AGGRAVATING CIRCUMSTANCE 'ARREST AVOIDANCE' BECAUSE ITS APPLICATION HERE REFLECTS SUCH A BROAD AND VAGUE CONSTRUCTION THAT IT VIOLATES THE EIGHTH AMENDMENT AND THE COURT OF APPEAL'S DECISION IS IN CONFLICT WITH GODFREY V. GEORGIA

IV. WHETHER THIS COURT SHOULD CORRECT THE CONFUSION AND CONFLICTS IN STATE AND FEDERAL DECISIONS AND EXPLAIN THAT THE EIGHTH AMENDMENT REQUIRES CAPITAL SENTENCING JURY INSTRUCTIONS WHICH CLEARLY AND EXPLICITLY INFORM JURORS OF THEIR OPTION TO RECOMMEND A SENTENCE OF LIFE IMPRISONMENT AND WHETHER THIS COURT SHOULD CORRECT THE ELEVENTH CIRCUIT'S INCORRECT DETERMINATION IN THIS CASE THAT THE JURY WAS ADEQUATELY INFORMED OF THE MERCY OPTION.

V. WHETHER PETITIONER WAS IMPROPERLY DENIED AN EVIDENTIARY HEARING ON HIS CLAIM THAT HE WAS INCOMPETENT TO STAND TRIAL AND BE SENTENCED TO DEATH, AND ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND WHETHER THE CIRCUIT COURT OPINION CONFLICTS WITH TOWNSEND V. SAIN, 372 U.S. 293 (1963).

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INTRODUCTION

This case involves the review of Aubrey Dennis Adams' first and only petition for writ of habeas corpus. Petitioner's conviction and sentence of death have thus far been upheld even though Petitioner has never received an evidentiary hearing on his factual habeas claims. Furthermore, the capital sentencing process involved critical balancing -- three statutory mitigating circumstances were found, and three statutory aggravating circumstances were held to outweigh them -- and certain of the legal errors asserted here infected this balancing process.

Petitioner, Aubrey Dennis Adams, requests that a writ of certiorari issue to review the decision of the United States Circuit Court for the Eleventh Circuit in Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985). Aubrey Dennis Adams is currently under sentence of death in the State of Florida.

OPINIONS BELOW

The opinion of the Circuit Court for the Eleventh Circuit rendered on June 17, 1985, is reported at 764 F.2d 1356. A copy of the opinion can be found in Appendix J to this Petition. A Petition for Rehearing and, In The Alternative, Suggestion for Rehearing En Banc was denied by the Circuit Court on August 13, 1985. A copy of that Order appears as Appendix K. All other prior opinions in this case are also contained in the accompanying Appendices.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the fifth, sixth, eighth, and fourteenth amendments to the Constitution of the United States.

2. This case also involves the Florida Death Penalty Statute, Section 921.141, Florida Statutes, which appears in Appendix L to this Petition.

HOW THE ISSUES WERE RAISED BELOW

Each of the constitutional issues presented in this Petition were raised by petition for writ of habeas corpus in the district court and raised on appeal to the United States Circuit Court for the Eleventh Circuit. Each of the issues had been previously presented to the state courts of Florida, which had rejected the constitutional grounds asserted by Petitioner.

STATEMENT OF THE CASE

A. PRIOR PROCEEDINGS.

(1) Conviction and Direct Appeal.

On April 4, 1978, Petitioner was indicted by the Marion County, Florida, Grand Jury for the first degree murder of Trisa Thornley. (Ex. 15 at 9).[1] The trial judge granted a general motion for change of venue and the case was tried before a jury in Lake County, Florida, beginning on October 12, 1978. At the close of the trial, on October 20, 1978, the jury returned a general verdict finding Petitioner guilty of first degree murder. (Ex. 15 at 115), without specifying whether the verdict was predicated on felony or premeditated murder grounds. The penalty phase commenced about one week after the verdict. The same jury returned an advisory verdict on October 27, 1978,

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[1]The various portions of the record will be referred to as follows:

R: Record from the Eleventh Circuit court below.

The various state court papers were filed as Exhibits 1, 1a-27b. Accordingly, the state proceedings will be referenced by the appropriate exhibit number and page number within the exhibit (i.e., Ex. 15 at 1). Key exhibits are as follows:

Ex. 2-9:	Volumes 1-8 of the transcript of Petitioner's state jury trial.
Ex. 10:	Proceedings on sentencing before the state trial court.
Ex. 15:	Record on direct appeal to the Supreme Court of Florida from the conviction and sentence.
Ex. 25:	Supplemental record on appeal to the Supreme Court of Florida from the denial of Petitioner's motion for post-conviction relief.

Appendices containing selected portions of the record accompanies this Petition. There are twelve appendices designated by the letters "A" through "L." Each section is separately paginated. Citations to the appendices will be referenced by the appropriate letter designation and the page number within the section (i.e., B-4).

indicating that a majority of the jury members wished to recommend the imposition of the death penalty. (Ex. 15 at 130). Sentencing was held on January 16, 1979, at which time the trial judge accepted the recommendation of the jury and sentenced Petitioner to death. (C-1) (Ex. 15 at 140-42). The sentence of death was based upon the trial judge's conclusion that the three statutory mitigating circumstances were insufficient to outweigh the aggravating circumstances. (C-6) (Ex. 15 at 145).

Petitioner's conviction was affirmed by the Florida Supreme Court. Four members voted to affirm both the conviction and the sentence of death. Two justices affirmed the conviction but dissented from the sentence of death. Adams v. State, 412 So.2d 850 (Fla. 1982) (D-1). Justice Boyd dissented from the part of the decision affirming the death sentence by specifically stating that the comparison of the aggravating and mitigating circumstances warranted a reduction of the sentence to life. Justice McDonald also dissented from the death sentence.

A petition for writ of certiorari to this Court was denied, with Justices Brennan and Marshall dissenting. Adams v. Florida, 459 U.S. 882 (1982).

On August 21, 1984, the Governor of Florida denied clemency and signed a death warrant requiring Petitioner's execution by electrocution between noon, September 13, 1984, and noon, September 20, 1984. Petitioner's execution was scheduled for Wednesday, September 19, 1984, at 7:00 a.m. (I-2).

(2) Post Conviction Proceedings--Florida Bar Volunteer Counsel.

Although this is Petitioner's first and only petition for writ of habeas corpus the courts below have failed to provide Petitioner an evidentiary hearing on any of his factual claims. Petitioner has never had an evidentiary hearing of any kind on his claim of incompetency to stand trial, his claim of incompetency to participate in the sentencing phase of his trial, or his claims relating to ineffectiveness of counsel. Absent action from this Court, Petitioner will be executed without having had any type of evidentiary hearing on these substantive

post-conviction claims.

The error to accord Petitioner an evidentiary hearing is inextricably linked to the extraordinarily short time in which volunteer counsel had to prepare this case on behalf of Petitioner. As this Court is aware, a crisis exists and has existed in Florida over the representation of death-sentenced inmates in collateral proceedings. At the time of Petitioner's death warrant, there was no right to post-conviction counsel in Florida, and many death-row inmates consequently became unrepresented upon completion of their direct appeal. During 1982-1984, 40% of the inmates scheduled for execution in Florida were unrepresented when their death warrants were signed.

As a result of this crisis in representation, the Florida Bar established the Special Committee on the Representation of Death-Sentenced Inmates in Collateral Proceedings. The function of that Committee was to recruit civil law firms in Florida to volunteer to represent inmates such as Petitioner. The goal in 1984 was also to establish a Resource Center to assist these volunteer civil attorneys, but that Center did not open until February, 1985.

Petitioner was not represented when his warrant was signed and the undersigned law firm was recruited by the Florida Bar to provide representation. The firm has no prior experience in capital cases or post-conviction cases. Needless to say, this is the first federal habeas corpus petition for Mr. Adams and for counsel.

Petitioner was rushed through state and federal court to the Eleventh Circuit Court before receiving a stay; no evidentiary hearing was afforded along the way. The Eleventh Circuit then denied several of Petitioner's claims on the basis that Petitioner, in his rush to obtain a stay in this first post-conviction proceeding, had failed to prove his claims sufficiently as he passed through the lower courts.

As the below chronology vividly illustrates, the conditions under which the Petitioner was forced to present his case per se limited his ability to address the merits of his claims.

DATE	EXPLANATION
Aug 21, 1984 (Tues)	The Governor of Florida denied clemency and signed a death warrant. Petitioner's execution was scheduled for noon, September 19, 1984. (I-2) (Ex. 25 at 16) (Dist. Ct. opinion at 2) (R-215).
Aug 27 (Mon) (day 1)	Undersigned counsel was informed by the Special Committee that Petitioner faced execution without counsel and without any meaningful opportunity to seek review in state and federal courts. After determining no other legal resources were available to Petitioner, the firm volunteered to represent Petitioner despite its lack of experience in such cases.
Sept 5 (Wed) (day 9)	Petitioner filed a motion for post-conviction relief to vacate judgment and sentence in the state trial court in Ocala, Florida. (Ex. 25 at 17-80). Various other post-conviction motions were also filed this date in the state trial court, including: (1) two-page application for stay of execution; (2) seven-page memorandum in support of Defendant's application for stay of execution; (3) three-page motion for an evidentiary hearing and for the production of Defendant at that hearing; (4) four-page motion for order of insolvency; (5) three-page motion for appointment and payment of experts and investigation; and (6) three-page conditional motion for continuance to allow time for discovery in this case. (Ex. 25 at 81-102).
Sept 7 (Fri) (day 11)	The state post-conviction judge entered the courtroom and immediately began reading an order denying relief. (Ex. 25 at 289-303).
Sept 10 (Mon) (day 14)	The denial of the post-conviction motions were immediately appealed to the Florida Supreme Court. The following were filed with that Court: (1) three-page application for stay of execution; (2) 23-page appellant's brief on appeal. (Ex. 11); (3) petition for state writ of habeas corpus (Ex. 18); (4) voluminous appendix to petition for state writ of habeas corpus (Ex. 17); and (5) reply brief to state's voluminous answer brief. (Ex. 13).

Sept 11 (Tues) (day 15)

Oral argument was held before the Supreme Court of Florida.

The same day, the Supreme Court of Florida rendered its opinion denying the relief sought, Adams v. State, 456 So.2d 888 (Fla. 1984) (F-1). Justice McDonald dissented. He believed the death penalty was improper and disproportionate in view of the mitigating circumstances and the highly questionable aggravating factor of allegedly killing to avoid arrest. He also believed the trial court should have held an evidentiary hearing regarding claims relating to ineffectiveness of counsel and incompetency of Petitioner to stand trial.

Sept 14 (Fri) (day 18)

Petitioner filed his federal petition for writ of habeas corpus in the United States District Court, Middle District, Jacksonville, Florida. (R-5-90). In the Petition, Petitioner again requested an evidentiary hearing.

Also filed this date in Jacksonville were various other motions, including: (1) two-page application for stay of execution; and (2) 14-page memorandum of law in support of Petitioner's application for stay of execution.

Sept 16 (Sun) (day 20)

The state filed a lengthy (over 50 pages) motion for summary denial and memorandum of law in support thereof.

Petitioner was telephonically notified that there would be a non-evidentiary hearing held before Judge Moore in Jacksonville (dist. ct. docket sheet at 3) (G-3).

The state filed a response to Petitioner's application for stay of execution. (R-191-201).

Sept 17 (Mon) (day 21)

Petitioner filed a six-page motion to amend the habeas petition which was granted by the court the same day. (R-205-10) (H-1). The amendment alleged further facts and psychiatric reports regarding Petitioner and his incompetence to stand trial or participate in the sentencing phase of trial, and alleged that these matters required an evidentiary hearing.

Less than 48 hours before Petitioner's scheduled execution, a non-evidentiary hearing on the petition was held in Jacksonville before United States District

	Court Judge Moore. (I-1) and (G-3). (dist. ct. docket sheet at 2.)
Sept 18 (Tues) (day 22)	Judge Moore issued a 27-page opinion denying the petition for writ of habeas corpus and also denying the motion for stay. (I-1) (R-214-40).
	Counsel was telephonically notified of the opinion at approximately 3:00 a.m. (G-5) (dist. ct. docket sheet at 5).
	Petitioner filed with the district court the following: (1) a three-page motion to stay execution pending appeal; (2) an application for certificate of probable cause; and (3) an application for certificate to appeal in forma pauperis. (R-242-45, 252-56).
	The state filed a response to (2) above. (R-246-49).
	The same day, the district court granted Petitioner's certificate of probable cause and leave to appeal in forma pauperis (R-250-51), and denied the motion for stay pending appeal. (R-257).
	Petitioner immediately filed: (1) a notice of appeal to the Eleventh Circuit. (R-252-53); and (2) an 11-page emergency motion for stay of execution.
STAY OBTAINED	Motion for stay of execution pending appeal was granted by the Eleventh Circuit in a two-page order.
Sept 19 (Wed) (day 23)	Petitioner's scheduled execution date.
	The State moved to reconsider the stay and this was denied by the Eleventh Circuit the same day.
	This Court denied attempts by the state to have the stay lifted. Wainwright v. Adams, ___U.S.___, 105 S.Ct. 54 (1984). Voluminous motions and responses were filed by both sides.
Sept 20, 1984-Nov. 1985	Extensive motions, briefs, rehearing, rehearing en banc, oral argument, etc. were had in appellate proceedings on the legal issues before the Eleventh Circuit which resulted in the opinion below, Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985). The opinion was dated June 17, and a timely

motion for rehearing was denied on August 13, 1985.

Both the district court below and the Eleventh Circuit have denied Petitioner a hearing on his claims on the basis that he had not proven sufficient facts so as to be entitled to an evidentiary hearing. This apparent "catch 22" (Petitioner is not entitled to an evidentiary hearing until he presents evidence; Petitioner cannot present evidence until Petitioner is granted an evidentiary hearing) is discussed in full at Point V below.

B. STATEMENT OF FACTS.

(1) The Guilt Phase of Trial.

The Eleventh Circuit summarized the facts adduced at Petitioner's guilt-innocence trial as stated below. The footnotes are supplied by undersigned counsel.

> In March 1978, the body of an eight year old girl was discovered in a remote wooded area near Ocala, Florida. The Petitioner's conviction for the young girl's murder was based on circumstantial evidence and incriminating statements he made to investigating officers.[2] Physical evidence found near the body was similar to evidence found in the Petitioner's home and automobile. In a written statement, the Petitioner admitted that he had offered the victim a ride home from school, she had accepted, and he had driven in another direction. The Petitioner remembered "being stopped somewhere and she was screaming and I put my hand over her mouth and she quit breathing."[3] Verbally, the Petitioner admitted

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[2]Both the written and oral statements were sketchy, disjointed, and brief.

[3]As to Petitioner's written statement that she was screaming and he put his hand over her mouth and she quit breathing, it is important to note that the written statement then says "not sure." (Ex. 7 at 1099). It must also be emphasized that the Florida Supreme Court specifically found that the victim did not die from this described suffocation. Adams v. State, 412 So.2d 850, 852 (Fla. 1982). In addition, both in its closing argument at trial, and in subsequent appellate briefs, the State has argued that the victim did not stop breathing or die at this point in time. (Ex. 8 at 1310). In its Brief to the Eleventh Circuit, in arguing that the evidence supports a conviction based on premeditated murder, the State made the statement:

> The evidence was sufficient to support a finding that death was caused by strangulation, not by the Defendant placing his hand over the mouth of the victim, so as to keep her from screaming or yelling.

State's Brief at 17 (emphasis added).

> removing the victim's clothes, using rope to tie her hands, and placing plastic bags over her body. When asked if he had any type of sexual relations with the victim, the Petitioner said he thought he had tried but could not do it or could not bring himself to do it. The testimony of the officers indicates that the Petitioner had difficulty remembering the details of the killing when questioned.[4]

Adams, 764 F.2d at 1358.

(2) The Penalty Phase of Trial.

This offense is Mr. Adams' first and only offense. During the penalty phase of trial, the state elected to rely on the evidence presented during the guilt phase as to aggravating circumstances and preserved its right to present rebuttal to any testimony and evidence introduced by Mr. Adams to show mitigating circumstances. (Ex. 8 at 1380-81; 1389).

Mr. Adams' first witness was Dr. Arthur Sullwold, who was accepted as an expert in the field of psychiatry. (Ex. 8 at 1390-93). Dr. Sullwold examined Mr. Adams on April 27, 1978. (Ex. 8 at 1394). He also interviewed Mr. Adams' parents. (Ex. 8 at 1395). Based upon these contacts, Dr. Sullwold was of the opinion and clinical conclusion that on January 23, 1978, Mr. Adams was in a state of severe emotional stress. (Ex. 8 at 1396). It was Dr. Sullwold's belief that the primary cause of Mr. Adams' emotional stress was a deteriorating marital situation which, among other things, involved his wife seeing a male friend of his who lived in an apartment directly across from the apartment in which he was living. (Ex. 8 at 1396-97).

Dennis Adams' parents, Marjorie and Aubrey Dennis Adams, Sr., testified that they had a loving relationship with Dennis during his childhood. Dennis was a good boy who caused no

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[4]This was all of the evidence used by the State and the courts below to support the conviction and the three aggravating circumstances found by the trial court. As noted in Argument I, infra, the jury was instructed on premeditated and felony-murder theories. The little evidence there was on premeditation, and the aggravating factors was obviously speculative and circumstantial. Under Jackson v. Virginia, 443 U.S. 307 (1979), this evidence is woefully insufficient to support a premeditation finding.

problems during the time he lived with them. He was close to his father, and the family often spent their leisure time hunting and fishing together.

Dennis was a large child, but emotionally immature. Dennis' emotional development never fit his physical development. (Ex. 9 at 1412). This condition continued through his entire adolescence and young adulthood. (Ex. 9 at 1412). Because he was much larger than the other children his age, he was frequently ridiculed and made fun of. (Ex. 9 at 1426). As a teenager, Dennis attended church and youth services and was a member of church youth groups. (Ex. 9 at 1425). He made friends easily, but had no real "best friends." His relationship with his family was better than that with other children. (Ex. 9 at 1426-1427).

At the age of puberty, Mr. Adams' parents convinced a physician to administer hormones to Mr. Adams in order to increase the size of his genitals. (Ex. 9 at 1418). His mother felt that these shots made him change from a person you could hug and touch to a person who did not like to be touched too much, or for anyone to get real close to him. (Ex. 9 at 1419).

Up through the sixth grade, Dennis had quite a few learning problems, but he managed to stay up with his class through his parents' help and summer school. (Ex. 9 at 1417-1418). He graduated from Lake Weir High School in June of 1976. He graduated number 30 out of a class of 213, in the top 15%. His grade point average was 3.26 and he was considered an above-average student. He was well liked by the class, although he was a quiet individual. (Ex. 15 at 136). After graduation, he attended Central Florida Community College and completed 15 hours with a grade point average of 2.67. (Ex. 15 at 136).

Dennis worked part-time during high school and full-time during the summers. (Ex. 15 at 133). During Dennis' last two years of high school, his father became disabled due to a heart condition and Dennis did everything that he could to assist the family. (Ex. 15 at 137).

While employed at Marion Correctional Institution as a Correctional Officer, Dennis was interested in his work in dealing with inmates. (Ex. 15 at 136). He held a service rating of "satisfactory" and his rating indicated that he was well-groomed, reliable and dependable. (Ex. 15 at 136). He completed a standard correctional course at Marion, as well as an 80-hour in-service training program. Dennis received a letter of commendation for his riot squad training. (Ex. 15 at 136). Dennis' co-workers described him as a very good Correctional Officer, a fine gentlemen, and as a happy-go-lucky person with a passive, quiet, and inoffensive personality. (Ex. 9 at 1430, 1433-1434, 1448).

Until the time of this crime, Dennis had never been involved in any criminal activity. (Ex. 9 at 1422, 1427; Ex. 15 at 132).

As a young adult, Dennis was devoted to his family and was very considerate. He was introverted and did not like to socialize. (Ex. 15 at 136). However, on an individual basis, he was a quiet, sympathetic person who was easy to talk to. (Ex. 15 at 137).

During the time he was growing up, Dennis did not have any girl friends. (Ex. 9 at 1427). Until he met his wife-to-be, he had never had any romantic engagements with anyone. (Ex. 9 at 1418). Dennis loved his wife very much; she was his whole life. (Ex. 9 at 1415; Ex. 15 at 137). He has been described as "idolizing" his wife. (Ex. 15 at 133). He kept a couple of hundred pictures of her. (Ex. 9 at 1415). Unfortunately, marital problems began early. When Dennis and Michelle first married, they lived with Dennis' parents. When Dennis would work late, Michelle would have other men pick her up at Dennis' parents' house. (Ex. 15 at 137). Because Dennis' parents did not approve of Michelle's philandering, Dennis and Michelle moved out and found a place of their own. (Ex. 15 at 137).

Dennis and Michelle separated on December 20, 1977, not long before Dennis' 20th birthday. (Ex. 15 at 132). Dennis was very upset on Sunday, January 22, 1978, the day before

Trisa Thornley's death. His wife had been seeing one of his co-workers, who lived across the street, and he knew that she had spent the night with his friend Saturday night, and that she was still there. (Ex. 9 at 1413-14). That night, he told his mother that he would give his whole life to have his wife back. (Ex. 9 at 1415). On the night of January 22, he kept going to his window to see if his wife's car was still across the street at his friend's house. (Ex. 9 at 1416-21). On January 23, his wife's car was still across the street and he remained very upset. (Ex. 9 at 1417, 1422). On Monday, he decided to go ahead and get a divorce and told his mother that he would be getting her divorce papers that day. (Ex. 9 at 1416). The date of the victim's disappearance was on or about January 23, 1978.

Dennis' characteristic way of handling strong emotions, such as feelings about his wife's open infidelity, was to withdraw into himself. (Ex. 8 at 1397). He was diagnosed by a psychiatrist as being in a state of "severe emotional stress" at the time the crime was committed. (Ex. 8 at 1398).

After hearing evidence in the penalty phase of the trial, the jury recommended by majority vote that Mr. Adams be sentenced to death. (Ex. 10 at 14-15). On January 16, 1979, the trial court sentenced Mr. Adams to death. (C-1-8).

The trial judge found three mitigating circumstances: (1) that the defendant had no significant history of prior criminal activity; (2) that the capital felony was committed while the defendant was under the influence of extreme emotional disturbance; and (3) the defendant's age (20 at the time of the crime). (Ex. 25 at 10). Despite these factors, Mr. Adams was sentenced to death.

In support of its sentence, the trial court found three aggravating circumstances. The first was that the capital felony was committed while defendant was engaged in or attempting to engage in, or in the flight after committing or attempting to commit rape and/or kidnapping. (Ex. 25 at 8). The finding of rape or attempted rape was based solely on the fact that the

victim's clothes were removed and that Mr. Adams made a statement that he thought he tried to have sexual relations with the victim but couldn't bring himself to do it. (Ex. 25 at 12). The second was that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. This finding was based solely on the trial court's previous finding regarding kidnapping and rape and that the victim's death prevented any testimony on her part concerning kidnapping and rape. (Ex. 25 at 12). The third was that the capital felony was especially heinous, atrocious, or cruel. (Ex. 25 at 8-9).

Additional facts and/or events occurring in the course of the proceedings will be referred within the separate arguments.

REASONS FOR GRANTING THE WRIT

This capital case involves several important issues which should be decided by this Court. The decision of the United States Circuit Court for the Eleventh Circuit is inconsistent with the decisions of this Court and conflicts with decisions of other federal courts of appeal and state courts of last resort. It presents constitutional issues of fundamental importance which are set forth within the five arguments presented infra.

ARGUMENT

I. MR. ADAMS' CONVICTION AND SENTENCE OF DEATH MAY REST UPON A NONEXISTENT CRIME AND/OR A CRIME FOUND TO BE UNCONSTITUTIONAL, IN VIOLATION OF THE FOURTEENTH AMENDMENT, AND THE DECISION OF THE CIRCUIT COURT CONFLICTS WITH STROMBERG v. CALIFORNIA, 283 U.S. 359 (1931).

In this case, the jury was instructed that they could convict Mr. Adams of first degree murder, without finding premeditation, if they found that the killing took place while he was committing an "abominable and detestable crime against nature." However, at the time the killing took place, there was no such crime in Florida. A conviction based on such a non-existent or unconstitutional crime violates due process.

This identical claim was presented to the Court in Dobbert v. Wainwright, ___U.S.___, 105 S.Ct. 34 (1984), but in Dobbert the issue was not decided on the merits because it was first raised in a successor habeas petition. The Dobbert federal district court had rejected this claim on abuse of the writ grounds, without addressing the merits. The Dobbert Eleventh Circuit Court simply adopted the district court decision, with a dissenter believing this Stromberg issue should be addressed on the merits.

This Court declined to grant certiorari on the issue of abuse of the writ.[5] Even in that "abuse" setting, two members of the Court believed the claim presented in Dobbert, and now herein, to be sufficiently compelling to merit review:

> The instruction at issue told the jury that it could convict for first degree murder if it found that the daughter was killed by premeditated design or that she was killed without premeditation but while Dobbert was committing an "abominable and detestable crime against nature." As a matter of state constitutional law, the Florida Supreme Court, in a holding that preceded the crimes for which Dobbert was convicted, had held that the statutory term "crime against nature" is too vague to sustain a conviction. Franklin v. State, 257 So.2d 21 (Fla. 1971). Dobbert was therefore found guilty after a felony-murder instruction that permitted the jury to

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[5]Mr. Adams presents this "error of federal constitutional magnitude" free of the abuse constraints that bound this Court and Mr. Dobbert.

> convict him of a crime that did not exist under state law at the time of his conviction.
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> . . . .
>
> This is clearly error of federal constitutional magnitude. In Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), the Court announced a rule from which we have not since departed: "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." Zant v. Stephens, ___U.S.___, ___, 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235 (1983). It is also clear that Stromberg applies to state criminal proceedings, for Stromberg itself involved a state conviction. See also Williams v. North Carolina, 317 U.S. 287, 292, 63 S.Ct. 207, 210, 87 L.Ed. 279 (1942); cf. Zant, ___U.S.___, 103 S.Ct. at 2748-50 (Justice WHITE, concurring in part and concurring in the judgment) (Stromberg applies when jury was invited to convict on two or more grounds, one of which was not sufficient to sustain the conviction).

Dobbert, 105 S.Ct. at 43 (Marshall, Brennan, JJ., dissenting from denial of certiorari).

The jury instruction at issue in this case was particularly prejudicial because of the nature of the trial and the State's arguments. Mr. Adams was arrested by warrant charging that he unlawfully killed a human being "while in the attempt to perpetrate sexual battery." (Ex. 15 at 1). He was indicted for first-degree murder, charging him, in the usual form in Florida, with killing "from a premeditated design to effect the death of" the victim, "in violation of Florida Statute 782.04."[6] (Id. at 9). The victim was an eight-year-old girl. Upon his arrest, Mr. Adams told police that the victim died when he put his hand over her mouth and she quit breathing. (Ex. 7 at 1099). The victim was unclothed when found, and police investigators testified that they asked Mr. Adams whether he had had sexual relations with the victim, to which he responded "he

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[6]Section 782.04, Fla. Stat., is also the felony-murder statute in Florida. See Appendix L-1. The indictment charged premeditated and felony-murder, see n. 11, infra, as a matter of black letter Florida state law.

just couldn't bring himself to do it ...." (Id. at 1128-29).[7]

The trial transcript reflects that an allegation of "sex offense" nevertheless permeated the proceedings. The State was explicit in its allegations from the beginning of trial. In opening statement, the prosecution underlined for the jury its theory of the circumstance of the crime:

> I think he took her to his house...to have intercourse with her but she was too small.

(Ex. 4 at 443).[8] The trial record is replete with references to sexual abuse and the removal of the victim's clothes (See Exs. 2-9, especially pages 443, 1100, 1132, 1128-31, 1135, 1163, 1170, 1310-12, 1330-32), which the prosecution finally elevated to the category of "sex lust" during closing argument. (Id. at 1312).

Injected into this aura of "sex lust" was a jury instruction inviting the jury to convict Mr. Adams of first-degree murder if they found the actions of Mr. Adams to constitute an "abominable and detestable crime against nature" or "rape." Id. at 1351. These "offenses" did not exist in Florida at the time of the jury instruction, and understandably went undefined.

Mr. Adams' contention, heretofore a matter of black-letter law, is that when a general verdict may be based on a

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[7]Police took a written statement from Petitioner which was introduced at trial. (Ex. 8 at 1098). The written statement contains no mention of attempted sex. Police "remembered," a month or so after the written statement was taken, that Petitioner had also discussed the matter of sex. (Ex. 8 at 1132). According to the officers, Petitioner was asked whether he had sex with the victim. The officers described Petitioner's response as: "he thought he had tried to but he didn't think he did"; "he just couldn't bring himself to do it"; he "couldn't do it;" and he "didn't do it." (Ex. 7 at 1100, 1128-31, 1170). Petitioner indicated to the officers that he removed the victim's clothes after she quit breathing. (Ex. 7 at 1135).

[8]There was no evidence to support this bold and calculatedly prejudicial preposition. See n. 4, supra. This "too small" characterization of why Mr. Adams allegedly abandoned a sexual offense is nothing short of manufactured. In fact, there was insufficient evidence to convince any rational juror of Petitioner's guilt of any sex related offense beyond a reasonable doubt, Jackson v. Virginia, 443 U.S. 307 (1979), even if the jury had been correctly instructed with regard to a constitutionally adequate statutory violation. See Petitioner's brief on direct appeal, Ex. 11 at 37-38; federal petition for writ of habeas corpus, at 22, n, 9 (R-26); the initial Eleventh Circuit Brief for Petitioner appellant (Habeas Corpus), Eleventh Circuit Petition for Rehearing and Suggestion for Rehearing En Banc at 5-6.

constitutionally adequate ground (premeditation)[9] or on a constitutionally impermissible ground (the non-existent felony-murder ground, murder during the course of an abominable and detestable crime against nature, or rape), the verdict cannot stand. Stromberg v. California, 283 U.S. 359 (1931). The circuit court decision rejecting this fundamental proposition is in error, and in conflict with long-standing and recently reaffirmed constitutional law. Zant v. Stephens, 462 U.S. 862 (1983); Chiarella v. United States, 445 U.S. 222, 237 n. 21 (1980); Leary v. United States, 395 U.S. 6, 31-32 (1969); United States v. Gallagher, 576 F.2d 1028, 1046 (3d Cir. 1978). Certiorari is appropriate under these circumstances. U.S. Sup.Ct. R. 17.1(c). If Stromberg is to be applied in the manner contemplated by the Circuit Court, this Court should be the instigator. Id.

Mr. Adams' second contention, separate and apart from the verdict issue, is that the sentence of death violates the eighth amendment when, as here, there can be no finding that Petitioner intended the death of the victim. Enmund v. Florida, 458 U.S. 782 (1982); Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985). The Circuit Court neglected to address this second contention, but Eleventh Circuit law is in conflict with Fifth Circuit law on this issue, which is now pending before the

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[9]Petitioner's use of the term "constitutionally adequate" should not mislead. There was insufficient evidence even of premeditation, but had there been sufficient evidence, premeditation would be a permissible verdict basis. See n. 4, supra. See also Eleventh Circuit Brief for Petitioner-Appellant (Habeas Corpus), at 59: "Here, there may have been no premeditation, deliberation, intent, or cold calculus that precedes the decision to act."

Court.[10]

A. The Petitioner was Indicted for Premeditated and Felony-Murder, and the Jury was Invited to Convict Petitioner of First Degree Felony-murder Predicated Upon Nonexistent Felonies.

In Florida, the "usual form" of indictment for first degree murder under Section 782.04, Florida Statutes (1977) (set out in Appendix L), is to "charg[e] murder ... committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So.2d 618, 624 (Fla. 2d DCA 1968).[11] The absence of felony-murder language is of no moment: when a defendant is charged in Florida with a killing through premeditated design, he or she is also charged with felony-murder, and the jury is free to return a verdict of first degree murder on either theory. Hill v. State, 133 So.2d 68 (Fla. 1961); Larry v. State, 104 So.2d 352 (Fla. 1958); Blake v. State, 156 So.2d 511 (Fla. 1963). Citing Barton, the Florida Supreme Court affirmed this proposition in Petitioner's direct appeal. Adams, 412 So.2d at 852 ("[u]nder this charge, the state could prosecute under both a theory of premeditation and a theory of

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[10] If Petitioner is correct on the Stromberg claim, the Enmund issue is moot. If Petitioner is incorrect on the Stromberg claim, Enmund may or may not arise. The Enmund claim is not simply a matter of sematics, but has serious eighth amendment implications. If the jury could have found felony-murder and no intent, then the death penalty is invalid under fifth circuit law. Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984) (sentence vacated). This Court is now reviewing the correctness of this Fifth Circuit analysis. Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984) (sentence vacated), cert. granted, Cabana v. Bullock, ___ U.S. _____, 53 U.S.L.W. 3757 (U.S. April 17, 1985) (No. 84-1236). The sentence is also invalid under Eleventh Circuit law, since the evidence of intent is insufficient. Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) (en banc). See n. 4, supra. Mr. Adams' second contention depends upon the outcome in Cabana v. Bullock, and its resolution should await this Court's decision there.

[11] See also Buford v. Wainwright, 428 So.2d 1389, 1391 (Fla. 1983); State v. Pinder, 375 So.2d 836, 839 (Fla. 1979); Knight v. State, 338 So.2d 201, 204 (Fla. 1976), all recognizing the Barton rule. Such an indictment by long-standing Florida practice, charges felony-murder as well as premeditated murder, despite the apparent absence of felony-murder language in the body of the indictment. Larry v. State, 104 So.2d 352 (Fla. 1958); Southworth v. State, 125 So. 345, 346 (Fla. 1929) (An indictment "charging [only] murder to have been committed with a premeditated design to effect the death" of the victim "charge[s] murder in the first degree, when committed in the perpetration of robbery."); Hargrett v. State, 255 So.2d 298, 300 (Fla. 3d DCA 1971).

felony-murder").

Mr. Adams was charged with first degree murder in the "usual form": murder "from a premeditated design to effect the death of" the victim, "in violation of Florida Statute 782.04." (Ex. 15 at 9). As already discussed, an indictment such as this which "tracked the statute" charges felony-murder: Section 782.04 is the felony-murder statute in Florida. See Appendix L; See also Lightbourne v. State, 438 So.2d 380, 384 (Fla. 1983). As the Circuit Court noted, the jury charge at guilt-innocence listed:

> as "murder in the first degree," both premeditated murder and felony-murder, with the latter being defined as killing during the commission of, or an attempt to commit, "rape,...abominable and detestable crime against nature or kidnapping...."

Adams, 764 F.2d at 1361 (footnote omitted).[12] The decision noted that rape "did not exist under Florida law," Id., at n. 3, and that "[t]he Florida statute prohibiting abominable and detestable crimes against nature had been declared unconstitutional before the Petitioner's trial. Franklin v. State, 257 So.2d 21 (Fla. 1971)."[13] Id. at 1361. The Circuit Court opined finally that:

> [t]he jury returned a general verdict finding the Petitioner guilty of murder in the first degree, without specifying whether the crime was premeditated or whether it simply occurred while the Petitioner was committing or attempting to commit one of the enumerated felonies.

Id. These findings place this case "on all fours" with Stromberg. Mr. Adams contends the Circuit Court incorrectly applied Stromberg and wrote with a basic misunderstanding of

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[12]Upon reviewing this instruction, the Florida Supreme Court recognized that a "felony murder instruction was given." Adams, 412 So.2d at 853. This is an interpretation of state law by a state's highest court, and it should be binding on federal courts. The panel below ignored the Florida Supreme Court's own interpretation of the state jury instruction.

[13]In Christian v. State, 272 So.2d 852, 856-57 (Fla. 4th DCA 1973), a case involving the same unconstitutional felony murder charge (abominable and detestable crime against nature), the court held that "[t]he act of instructing the jury that it could find the defendant guilty of a non-existent crime pursuant to an unconstitutional statute is fundamental error of the worst sort." The panel below held otherwise.

Florida law regarding a charge and a conviction of first degree felony-murder.

B. Stromberg v. California Voids the Conviction.

At the trial of this case, the state trial court instructed the jury on first degree murder as follows:

> The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree even though there is no premeditated design or intent to kill.

(A-7) (emphasis added). This charge was repeated or referred to no less than four times during the jury instructions (A-7, 8, 11-12). The Florida Supreme Court held that this was a "felony-murder instruction." Adams, 412 So.2d at 850. Thus, under Florida law, the jury was clearly charged that, even without premeditation, the commission of a murder during the course of rape or an abominable and detestable crime against nature is murder in the first degree. There is no dispute between the parties regarding the following: (1) the jury was told that the killing of a human while committing or attempting to commit an abominable and detestable crime against nature, or rape, is first degree murder; (2) the jury returned a general verdict finding Petitioner guilty of first degree murder; (3) there is no such crime in Florida as an abominable and detestable crime against nature and there was no crime of rape, Adams, 412 So.2d at 852-53; and (4) the former crime of an abominable and detestable crime against nature was found to be unconstitutional and void for vagueness in Franklin v. State, 257 So.2d 21 (Fla. 1971). The resulting conviction is a clear violation of Mr. Adams' rights to due process.[14]

This Court in Stromberg v. California, 283 U.S. 359 (1931), held as a matter of due process that a verdict which might be based on an unconstitutional ground cannot stand, even if there

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[14]Petitioner's conviction cannot be allowed to stand because it is a fundamental requirement of due process that a person not be convicted of a crime that does not exist. Adams v. Murphy, 653 F.2d 224, 225 (5th Cir. 1981).

are alternative theories to support the verdict.[15] The Stromberg rule is that when the jury is instructed on alternative theories, "it is impossible to say under which clause of the statute the conviction is obtained." Id. at 368 (emphasis added). Thus Stromberg teaches that the reviewing courts are not to look at whether there is sufficient evidence to support a jury verdict on a legal ground where one of the grounds charged is unconstitutional.[16]

There is no equivocation in the Stromberg holding. Under Stromberg, the appropriate analysis is not whether there was sufficient evidence of premeditation, but whether under the jury instructions the jury was permitted to convict for an unconstitutional and/or nonexistent charge. The jury here was instructed that murder during rape or during an abominable and detestable crime against nature was first degree murder, and the trial jury reached a general verdict, stating only that Petitioner was guilty of first degree murder. The verdict does not specify whether the jury's decision was based on the nonexistent and unconstitutional crimes. Therefore, under Stromberg and its progeny, the conviction and sentence cannot stand since "it

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[15]The principle of Stromberg has been consistently reaffirmed by this Court. Leary v. United States, 395 U.S. 6 (1969); Thomas v. Collins, 323 U.S. 516, 528-29 (1945); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Yates v. United States, 354 U.S. 298, 311-13 (1957); Street v. New York, 394 U.S. 576, 585-88 (1969); Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970). See also Zant v. Stephens, 462 U.S. 862 (1983). In Zant, the court described the Stromberg rule:

> One rule derived from the Stromberg case is that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.

462 U.S. at 881 (emphasis added).

[16]Since Stromberg, no federal court has weighed the evidence in a record for the purpose of making an independent determination as to whether the jury in such a case could have based its verdict on valid grounds. Of the cases previously cited by the State, the only case which makes an extensive review of the evidence is Cramer v. United States, 325 U.S. 1 (1945). The Court in that case, however, made it clear that the purpose of its review was to determine if the evidence supported all of the grounds on which the Defendant was convicted. Id. at 36. Since there is no amount of evidence which could ever support a conviction based on a nonexistent crime, such an approach is not warranted in this case.

is impossible to say under which clause of the statute the conviction was obtained." Stromberg, 283 U.S. at 368.[17]

C. It is Impossible to Discern the Basis for the Jury's Verdict.

The Circuit Court acknowledged that the jury was instructed that felony-murder was first degree murder and that murder during the commission of rape or an abominable and detestable crime against nature was felony-murder. The decision also acknowledged that a general verdict of guilt was returned. The Circuit Court also agreed that the crimes of rape and abominable and detestable crime against nature did not exist, thereby agreeing sub silentio that a first degree felony-murder conviction based on these felonies would violate due process. The court then broke new ground by deciding that Stromberg did not require a reversal.

The flaw in the lower court's decision is its interpretation of Stromberg: the Circuit Court explained that Stromberg states simply that if it is "impossible" to say on which ground the verdict rests, the conviction must be reversed, Stromberg, 283 U.S. at 368. Adams, 764 F.2d at 1362. The court then "explained" why it was not impossible here. Stromberg, in fact, does not ask a reviewing court to determine whether it is impossible to say on which ground the verdict rests. Stromberg, at the cited page, states unequivocally that, when the jury instruction is on alternative grounds and a general verdict is returned, it is impossible to determine which ground the jury used. There is no room for speculation per Stromberg under these circumstances: it is impossible to say upon which ground the verdict rested.

Even under the Circuit Court's misreading of Stromberg, the verdict must be reversed. The Circuit Court gave the

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[17]The State has argued that the Stromberg rule applies only when one of the two theories under which the case was submitted to the jury involves constitutionally protected behavior. This Court has never before so limited Stromberg, see Leary v. United States, 395 U.S. 6, 31-32 (1969); Chiarella v. United States, 445 U.S. 222, 237 n. 21 (1980); Zant v. Stephens, 462 U.S. 862 (1983).

following reasons why it was possible to discern that the verdict was based upon premeditation.

(1) "The indictment charged the Petitioner with premeditated murder. Felony-murder was not alleged." Adams, 764 F.2d at 1361.

This is a misunderstanding of Florida law, and in direct conflict with the Florida Supreme Court's decision in this case.[18] The indictment indeed did say the murder was from a premeditated design, and that the murder was in violation of Section 782.04, Florida Statutes. Under Florida law, this is a "charge" and "allegation" of felony-murder. See discussion and cases at text, pp. 18-20, supra. The jury was specifically instructed that this indictment included a charge of felony-murder and the Florida Supreme Court explicitly recognized that the jury was instructed on felony-murder. Adams, 412 So.2d at 850. It was then fundamentally flawed reasoning for the court to conclude that "the indictment charging only premeditated murder was submitted to the jurors ...." Adams, 764 F.2d at 1363. The indictment did charge felony-murder, under Florida law, the jury was told so, the Florida Supreme Court acknowledged both these state law propositions, and the indictment cannct thus serve as a basis for saying it is possible to discern upon which ground the jury verdict was based.

(2) The trial court's reference to felony-murder "appears early in the instructions as part of what were, in essence, statutory definition. The actual and controlling charge came later ...." Adams, 764 F.2d at 1362-63.

In the quoted sentence, the Circuit Court appears to suggest that when instructions are "early" and merely "statutory definition," it is possible to say that the jury ignored them. The fact that the jury was given statutory definitions is the heart of Mr. Adams' complaint: the indictment read and

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[18]The circuit court correctly noted that the Florida Supreme Court had misanalyzed the Stromberg issue, but the Florida supreme Court did not misanalyze Florida law in its conclusion that felony-murder was charged or instructed. The panel improperly substituted its interpretation of Florida law for the Florida Supreme Court's interpretation.

submitted to the jury[19] recited that the killing was "in violation of Florida Statute 782.04," and, as the Circuit Court concluded, the jury was then instructed on the "statutory definitions": felony-murder. The Florida Supreme Court recognized that there was an "actual" jury charge on felony-murder. Adams, 412 So.2d at 852.

That these instructions came "early" hardly eliminates their effect. The felony-murder instruction fell on the heels of the court's instruction that "your verdict must be based solely on ... the law as it is given to you by the Court," A-2, and was never contradicted by any other instructions of the court. The Circuit Court decided, however, in a three-sentence analysis, that the only important law "as it is given to [the jury] by the Court" came later:

> The actual and controlling charge came later in the instructions, when the trial court told the jurors that, if the elements of homicide were found, their next task would be to determine its degree. At this point, premeditated murder was the only killing stated to constitute murder in the first degree. Therefore, the jurors were actually instructed to consider only premeditated murder as murder in the first degree.

Adams, 764 F.2d at 1362-63 (footnotes omitted). The court gave no more indication of why the "later" instruction was "controlling," why it, as opposed to the earlier felony-murder instruction, was the "actual...charge," or why the court ignored the Florida Supreme Court's recognition and explanation of Florida felony-murder law.

In fact, unlike the specific felony-murder instruction, the "later" instruction referred to by the court was given simply "[t]o summarize." Adams, 764 F.2d at 1363, n.6. A summary by definition does not include all that has come before. For instance, before its summary, the trial court had instructed the jury for over a page of transcript regarding premeditation. (A-5-6). It was not repeated in the Circuit

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[19]The jury actually carried the indictment with them to the jury room during deliberations. (Ex. 8 at 1368).

Court's relied upon summary of all instructions, which lasted a little over a page. Adams, 764 F.2d at 1363, n. 6. The jury had been instructed for two pages on what "unlawful homicide" meant before the summary, A-3-4, and the summary reduced the discussion to a paragraph. Second-degree murder was similarly "summarized."

The felony-murder instruction was simple, clear, had been stated twice, and required no summary:

> The killing of a human being in committing or in attempting to commit any ... rape ... abominable and detestable crime against nature ... is murder in the first degree, even though there is no premeditated design or intent to kill. If a person kills another while he is trying to do or commit any ... rape ... abominable and detestable crime against nature ... or while escaping from the immediate scene of such crime, the killing is in the perpetration of or in the attempt to perpetrate such ... rape ... abominable and detestable crime against nature ... and is murder in the first degree. The punishment provided by law for murder in the first degree is life imprisonment or death. ...

(A-7). After the later "summary" the trial court again instructed, without any mention of premeditation, "if you find the defendant guilty of murder in the first degree, then at a later proceeding you will render an advisory sentence to the Court recommending that the Defendant be sentenced to life or death." (A-11).

There is no basis for believing that a jury understood the "summary" to be the only "actual and controlling charge," or that because of it, it is possible to determine the ground upon which the verdict was based.

(3) "(1) a felony-murder theory was not advanced at trial, (2) the closing arguments of both the State and the Petitioner focused on premeditation to the complete exclusion of felony-murder." Adams, 764 F.2d at 1363.

These two factors are the remaining factors which convinced the Circuit Court that "it is not impossible to determine on which ground the Petitioner's conviction for first degree murder rests." Adams, 764 F.2d at 1363. These "factors" are not correct, and even if correct, do not make it possible to discern the basis for the jury's verdict.

First, it is not accurate to say across the board that felony-murder was not suggested to the jury during trial and argument. As discussed in detail in text, pages 15-16, supra, the aura of "sex-offense" permeated the trial and the State's prosecution. The prosecution began the trial by accusing the defendant of what most reasonable jurors would consider an abominable and detestable attempted rape or crime against nature: attempted forced sexual intercourse with an eight-year old girl ("I think he took her to his house...to have intercourse with her but she was too small.") (Ex. 4 at 443).[20] In closing arguments, the State accused Mr. Adams of "sex lust," Ex.8 at 1312, and throughout the trial there were references to the victim's nudity and questions regarding whether she was disrobed before her death. See text, page 16, supra. It simply blinks reality to believe that the jury was not encouraged to believe that Mr. Adams was guilty of an abominable and detestable sex offense.

Even if it is accepted that the actual argument was restricted to premeditated murder,[21] that merely accentuates the harmfulness of the felony-murder instruction. Without doubt, premeditation was hotly disputed, and deserved considerable argument because of the dirth of the evidence on the issue.[22] The jury instruction, however, made the jury's task simple on the complex premeditation issue: they could simply ignore it, and still find Petitioner guilty of first degree murder, by finding sex offense.

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[20]As previously discussed, there was no evidence to support this theory. See n. 8, supra.

[21]Of course, argument is not evidence or law. The jury was instructed that closing argument was "not to be construed by you as evidence in this case or instructions on the law." (Ex. 8 at 1299). During jury selection the State told jurors to apply the law as instructed by the Court:

> Mr. Oldham: Whatever the Court tells you the law is, will you follow that... regardless of what I think the law is or Mr. Black or someone else, would you do that?

(Ex. 2 at 34-35). Assuming the jury agreed with these propositions, theories advanced or arguments made were irrelevant. The court's instruction was the only definition of what was and was not illegal.

[22]See nn. 2-4, supra.

If premeditation was too hard to decipher, as it should have been, based on the evidence, the jury could simply not bother. The prosecution's "sex lust" theory was all the jury had to accept, and it is impossible for any court to say the jury did not.

D. By Affirming the Statutory Aggravating Circumstances of Felony-Murder, the Circuit Court Recognized the Compelling Possibility that the Jury Verdict of Guilt Rested on Felony-Murder Grounds.

The only evidence offered by the State at sentencing was rebuttal evidence having nothing to do with the nature of the crime. The State specifically relied on only what the jury and court had already heard at guilt-innocence to establish statutory aggravating circumstances. The trial judge held that this evidence proved the statutory aggravating circumstance of felony-murder (rape/kidnapping), and the Circuit Court affirmed that finding. Adams, 764 F.2d at 1363-65. It cannot be reconciled now, what was compellingly valid for the judge to find at sentencing was "impossible" for the jury to find at guilt-innocence.

The Circuit Court simply ignores that which even the Florida Supreme Court acknowledged: the jury was instructed upon and could have relied upon felony-murder. In the Florida Supreme Court decision, the court took great pains to analyze the evidence to determine "whether the evidence was sufficient to support a finding of premeditated murder." Id. at 1362. That analysis would be moot had the jury not been entitled to rely on felony-murder. The Florida court believed the jury could but did not rely on felony-murder. The Circuit Court acknowledged that the Florida Supreme Court's weighing of the evidence was improper under Stromberg but then created from whole cloth the notion that the jury could not have relied on felony-murder, for the reasons explained above.

Based on the evidence presented and the instructions given the jury, there is no way to determine whether or not the jury based its decision on a nonexistent and/or unconstitutional crime. As a result, Mr. Adams' conviction cannot be allowed

to stand because it is a fundamental requirement of due process that a person not be convicted of a crime that does not exist. A writ of certiorari to review the decision of the Circuit Court should be granted: the decision is in conflict with Stromberg.

II. THE JURY WAS INFORMED THAT MR. ADAMS' COMMISSION OF CERTAIN NAMED FELONIES COULD SUPPORT A FELONY-MURDER CONVICTION AND COULD BE THE PREDICATE FOR A FINDING OF STATUTORY AGGRAVATING CIRCUMSTANCES, BUT THE JURY WAS NOT INSTRUCTED ON THE ELEMENTS OF THE NAMED FELONIES, IN VIOLATION OF THE EIGHTH AND FOUTEENTH AMENDMENTS, AND THE CIRCUIT COURT'S RESOLUTION OF THESE ISSUES CONFLICTS WITH THIS COURT'S DECISION IN HENDERSON V. KIBBE, 431 U.S. 145 (1977), AND THIS COURT'S REQUIREMENT OF RELIABILITY IN CAPITAL PROCEEDINGS.

It is impossible to determine whether the verdict in this case rested upon premeditated or felony-murder grounds. See Argument I. If the verdict rests on felony-murder grounds, it is fundamentally flawed, for reasons unrelated to Argument I. The trial court did not define for the jury the elements of the underlying felonies upon which their felony- murder conviction could be based. Since the jury could have convicted Mr. Adams of felony-murder without knowing the elements of the underlying felonies and without determining whether the elements were proven beyond a reasonable doubt, a felony-murder conviction here violates due process. Henderson v. Kibbe, 431 U.S. 145 (1977). Stromberg requires reversal of the conviction, but the Stromberg error spills over into and infects this claim.[23]

It is not only the verdict that suffers from this instructional omission. The jury was allowed to consider and find a statutory aggravating circumstance -- killing in the commission of a sexual battery and/or kidnapping -- without knowing the elements of the crimes of sexual battery or kidnapping. Thus,

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[23]The Circuit Court rejected this argument on the merits, "since we have already determined that the jury considered and found only premeditated murder." 764 F.2d at 1364. The Circuit Court's decision on critical and fundamental constitutional issues is thus completely wrapped up in the Stromberg misanalysis, and Mr. Adams' life literally hangs in the balance. No procedural bar to the consideration of this claim was entertained.

the jury recommendation of the death sentence, which the trial judge must accord to great weight under Florida law, Tedder v. State, 322 So.2d 908, 910 (Fla. 1975),[24] was not a reliable recommendation. It was completely unguided and unchanneled in violation of the eighth amendment. The court of appeals failed to analyze the error in terms of eighth amendment law.

A. Guilt-Innocence.

The state must prove the elements of a crime beyond a reasonable doubt to sustain a conviction. Jury instructions which fail to inform the jurors of the burden or of the essential elements which must be proven are constitutionally lacking, and a conviction based upon such faulty instructions violates due process. Henderson v. Kibbe, 431 U.S. 145 (1977).

In Kibbe, this Court addressed the question of whether the failure to define one element of an offense (causation in vehicular homicide) was fundamental due process error requiring reversal. Under the circumstances in Kibbe, this Court held that in collateral proceedings the fourteenth amendment question is whether the instruction so infected the entire trial that the resulting conviction violated due process, 431 U.S. at 154, and no such "infection" occurred in Kibbe.

Kibbe involved an "element" often subsumed in other elements -- causation. This Court recognized that the jury's finding of "recklessness" in Kibbe was in large part a finding of causation, and no prejudice resulted from the omission of a causation instruction.

More "critical elements" of crimes, when omitted from jury instructions, may indeed cause a fourteenth amendment violation. For instance, in Glenn v. Dallman, 686 F.2d 418 (6th Cir. 1982), the habeas petitioner contended that the state's charge of aggravated burglary required, as an essential element

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[24]By contrast, a jury recommendation of life imprisonment in Alabama and Indiana, the only two other states with the jury override, is entitled to no special deference. Ala. Code § 13A-5-473(1981); Ind. Code Ann. § 35-50-2-9(e)(2). Instructional error in these states would therefore be harmless. Baldwin v. Alabama, ___U.S.___, 105 S.Ct. 2727 (1985).

a finding that a person was either present or likely to be present in an occupied structure at the time of the crime. The state trial court had simply charged the jury that there must be unlawful entry of an occupied structure.

There was no question in Glenn, just as there is no question here, that the state law required that essential elements of the crime must be charged to the jury. The federal district court in Glenn, however, found the omission to be "harmless error" because the evidence was sufficient to require a reasonable juror to conclude that the element omitted in the instruction was present. Id. at 420.

On appeal, the Sixth Circuit Court reversed. The court recognized that this Court in Kibbe required a federal habeas petitioner to show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." However, the court had little difficulty in determining that the trial court's erroneous instruction met this standard:

> It is a fundamental constitutional law that no one may be convicted of a crime absent proof beyond a reasonable doubt of every fact necessary to constitute that crime. See, e.g., In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Where a jury sits as the finder of fact in a criminal trial, the court's instructions to the jury concerning the necessary elements of the crime charged are the only means of assuring that the State is put to its burden of establishing every element of the crime. While the stringent test enunciated by the Supreme Court in Henderson [Kibbe] may insulate many if not most varieties of erroneous jury instructions in state criminal trials from federal habeas corpus relief, the complete failure to instruct on an essential element of a crime must, in most cases, be an exception.

Glenn, 686 F.2d at 420-21 (footnote omitted) (emphasis added).

Glenn and Kibbe demonstrate that there is a continuum of prejudice which may arise from instructional omissions related to the elements of a crime. In Kibbe, the omission of the element of causation was not sufficiently prejudicial -- it is simply common sense that a juror would intuit the necessity for a finding of causation, and it was "clear to the jury that such an issue had to be decided." 431 U.S. at 153-54. The element

omitted in Glenn could not be so intuited -- that is, that a person must have been in the premises for the crime of aggravated burglary to have been committed.

The case sub judice is much further than Kibbe or Glenn along the prejudice continuum. Mr. Adams does not complain about the omission of a common sense element, or even about the omission of an instruction on one element that would be difficult for a juror to intuit. Mr. Adams' complaint is that no elements of the underlying felonies were revealed to the jury.

The trial judge herein merely listed the names of the underlying felonies. This laundry list recited each felony which could form the basis of a finding of felony-murder. The instruction in no way informed the jury of what the crimes were and what the state had to prove.

Certiorari should be granted on this issue. The Circuit Court misinterpreted Stromberg, to conclude that premeditated murder was the basis for the jury verdict. As discussed in Argument I, premeditation was a hotly contested and close issue. If the Circuit Court is wrong on Stromberg, the verdict must be reversed. Given the evidence, a juror may have very well welcomed a ground for conviction that required little evidentiary analysis. Convicting someone of murder based on some undefined felony is the path of least resistance, and there is nothing in this record to show the jury did not so short-circuit the deliberative process. A verdict based on such an instruction (or lack of instruction) cannot stand, Kibbe, Glenn, and if the verdict could have been so based, as here, reversal is required. Stromberg.

B. Death Penalty.

The error was exacerbated at sentencing, but the Circuit Court used guilt-innocence, fourteenth amendment analysis, not eighth amendment analysis, to resolve the issue. The distinction makes a difference.

It helps to recall that equipoise prevailed in the number of statutory mitigating and aggravating circumstances found by the sentencing judge. Injected as it was, into that fragile

balance, the jury recommendation of death surely helped tip the scales against Petitioner. Any error in the jury recommendation process must consequently be critically analyzed.

The jury was instructed that "[o]ne of the three aggravating factors [they could consider] was [whether] the killing had occurred during the commission of, or an attempt to commit, rape or kidnapping. Again, however, the trial court did not define the elements of these felonies." Adams, 764 F.2d at 1364.

The Circuit Court acknowledged that this was error, but then used fourteenth amendment Kibbe language to ward off reversal: under the fourteenth amendment, the effect of the error was termed "too speculative to justify the conclusion that constitutional error was committed." 764 F.2d at 1365, quoting Kibbe. What may be "too speculative under the fourteenth amendment" to disturb a jail sentence, Kibbe, may nevertheless be sufficiently "speculative" to destroy the reliability of a sentence of death. The Circuit Court used "jail sentence" language to validate a very different type of punishment -- death. As this Court has repeatedly held, any risk of error in a capital case must rest with the state, and validating a death sentence based upon its degree of "speculativeness" is untenable.

Beck v. Alabama, 447 U.S. 625 (1980), makes the point. In Beck, this Court ruled that guilt-innocence procedures which were not required "as a matter of due process" could nevertheless be required by the eighth amendment if failure to follow them "diminished reliability." Although the Circuit Court herein admitted sub silencio that there was some speculation necessarily attendant with the jury recommendation of death when the jury was allowed to consider undefined felonies in aggravation of punishment, the court believed that the speculation that it was prejudicial was too great to cause a fourteenth amendment violation. That is not a sufficient analysis.

The harm here is acute. The jury was allowed to convict on a felony-murder theory, without being provided any definitions of the underlying felonies. The jury was then allowed to

consider undefined felonies in statutory aggravation. Based upon this procedure, the jury recommended death. The judge took this recommendation into consideration when weighing and balancing the three statutory mitigating and three statutory aggravating circumstances. If we must characterize the complaint as too speculative in order to dismiss it, then the sentencing procedure is and was inherently unreliable. Certiorari is appropriate to correct the Circuit Court's inappropriate use of a due process case and analysis to defeat an eighth amendment claim. U.S. Sup.Ct. R 17.

III. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE APPLICATION OF THE AGGRAVATING CIRCUMSTANCE 'ARREST AVOIDANCE' BECAUSE ITS APPLICATION HERE REFLECTS SUCH A BROAD AND VAGUE CONSTRUCTION THAT IT VIOLATES THE EIGHTH AMENDMENT AND THE COURT OF APPEAL'S DECISION IS IN CONFLICT WITH GODFREY V. GEORGIA.

A statutory aggravating circumstance may be constitutional on its face but unconstitutional as applied. In this case, there was an unconstitutional application of an aggravating circumstance (commission of a capital felony to avoid arrest) for two reasons. First, the evidence is insufficient to establish the circumstance beyond a reasonable doubt as required by the fourteenth amendment. Jackson v. Virginia, 443 U.S. 307 (1979). Second, if the evidence does establish this aggravating circumstance, there is no meaningful basis for distinguishing this case, in which the aggravating circumstance and death penalty has been imposed, from the other cases in Florida in which it has not, and hence there is a violation of the eighth

amendment. Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980).[25]

The application of a statutory aggravating circumstance must be overseen by the state supreme court to ensure that it truly channels sentencing discretion and is not an automatic aggravating circumstance which arises in every homicide. Godfrey. The Florida Supreme Court failed in this case to assure that this aggravating circumstance was constitutionally applied. The arbitrary application of the avoidance of arrest aggravating circumstance under the facts of this case is clearly demonstrated by comparing this case to Doyle v. State, 460 So.2d 353 (Fla. 1984). In Doyle, under very similar facts, the Florida Supreme Court invalidated an avoidance of arrest finding. Doyle was decided the month after Mr. Adams received a stay from the Eleventh Circuit, and demonstrates the arbitrariness of the finding here.

Although the Circuit Court below characterized the issue in Doyle as one of insufficient evidence (fourteenth amendment analysis), rather than an arbitrary application of the death penalty (eighth amendment analysis), the Circuit Court would apparently have reached the same conclusion (that Doyle was dissimilar) whether it applied a fourteenth amendment analysis under Jackson or an eighth amendment analysis under Godfrey. However, if this case and the Doyle case are not distinguishable

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[25]While any risk of error at capital sentencing must be policed at every juncture, this case involves unique findings at sentencing which suggest that an especially vigilant concern is proper. This was twenty-year-old Dennis Adams' first offense. The trial court found compelling evidence in mitigation, including the fact that the offense was committed during a time when Mr. Adams was under the influence of extreme mental or emotional disturbance. The judge also found Mr. Adams' age (20) and insignificant history of criminal conduct to be mitigating.

Balanced against this mitigation was the judge's finding of three statutory aggravating circumstances. The invalidation of any of the aggravating circumstances should result in a life sentence in this case, or at least a new trial court balancing of these circumstances. Thus, there must be a highly tuned examination of the validity of the statutory aggravating circumstances.

The death penalty was deemed inappropriate in this case by two justices of the Florida Supreme Court. Of particular relevance to the instant claim is Justice McDonald's opinion in state post-conviction that the support for the arrest avoidance aggravating circumstance was "highly questionable."

and the decision in Doyle is based on insufficient evidence, the court should have invalidated the same avoidance of arrest circumstances in this case on the same grounds it invalidated it in Doyle. In fact, it is impossible to meaningfully distinguish Doyle from this case. Therefore, this Court should grant certiorari to review the Eleventh Circuit's opinion regarding this issue.

A. Jackson v. Virginia -- The Evidence Does Not Support This Aggravating Circumstance.

The standard that Florida has established for the finding of the aggravating circumstance of commission of a capital felony to avoid arrest is that it must be clearly shown that the dominant or only motive for the murder was the elimination of witnesses." Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979).[26] There is no rational basis for a finding that the evidence in this case shows that the dominate or only motive for the murder was to eliminate the victim as a witness.

The evidence upon which the Circuit Court relied in upholding this aggravating circumstance was a written confession which states that Mr. Adams put his hand over the victim's mouth to silence her screaming, and she quit breathing.[27] The Circuit Court apparently believed Mr. Adams murdered the victim to stop screaming, which would avoid detection. However, no Florida court or any attorney for the State of Florida had previously advanced this theory of the victim's death. The Florida Supreme Court specifically held:

> The evidence is sufficient to sustain a finding that the death was caused by strangulation, not by the defendant placing his hand over the mouth of the victim so as to keep her from screaming or yelling.

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[26]See also Doyle, 460 So.2d at 358 (Fla. 1984); White v. State, 403 So.2d 331, 338 (Fla. 1981).

[27]The only other factor cited by the Eleventh Circuit as a basis for its decision is that "the present case involves a charge of kidnapping as well as rape." Adams, 764 F.2d at 1366. Such a finding is totally inconsistent with the court's ruling on the Stromberg issue that there was no charge of kidnapping given to the jury. Id. at 1362-63.

Adams, 412 So.2d at 852.[28] This theory has also been rejected by the attorneys for the State of Florida as untrue.[29]

Under any theory, the evidence on this issue cannot be fairly characterized as sufficient to have led any rational trier of fact to find beyond a reasonable doubt that this aggravating circumstance existed.[30] Jackson v. Virginia, 443 U.S. 307 (1979).

The fact that the evidence is insufficient to sustain this finding is illustrated by the various unsupported and contradictory "facts" relied upon by the Florida courts, the federal district court and the Eleventh Circuit to uphold this finding. At every stage, the claimed evidentiary basis for the aggravating circumstance has shifted. The plain facts are that the time, place, and manner of death is unknown, and the assignment of a "primary motive" for the death is nothing less than arbitrary. The courts have played "multiple choice" with this aggravating circumstance by speculating about various inconsistent hypothesis which allegedly would support the finding. None of the speculative basis are constitutionally sufficient.

The Circuit Court in a manner similar to the Florida

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[28]It was a total misapplication of existing precedent for the Eleventh Circuit to overturn a factual finding of the Florida Supreme Court in order to uphold a decision of the Florida Supreme Court which was otherwise erroneous.

[29]Indeed, the State strongly asserted at trial, especially in closing arguments, that death was caused by strangulation and not by Petitioner placing his hands over the victim's mouth. (Ex. 8 at 1310). In its Brief to the Court of Appeals, in arguing that the evidence supported a conviction based on premeditated murder, the State makes the statement:

> The evidence was sufficient to sustain a finding that the death was caused by strangulation, not by the defendant placing his hand over the mouth of the victim, so as to keep her from screaming or yelling.

State's Brief at 17 (emphasis added). The point, of course, is not strangulation or suffocation but whether reducing screams was the purpose of the murder. Only the Eleventh Circuit panel has come up with this theory, and Petitioner believes there is no evidence in the record to support such a finding.

[30]It is clear that the Florida Supreme Court considered this aggravating factor in its review of the propriety of the death penalty. Consequently, the balancing process created by Fla. Stat., § 921.141, was infected by the court's application of an arbitrary and capricious standard. Godfrey, 446 U.S. at 428.

Supreme Court and the federal district court, has inserted and deleted "facts" in an effort to sustain the finding of the aggravating circumstance in question. Petitioner is endlessly fielding the ever changing speculation supporting the finding. The state trial court found the aggravating factor solely because it found Petitioner committed or attempted to commit a kidnapping and/or rape, and that the victim's death prevented her from testifying. (Ex. 25 at 12). Since this could not be a basis to distinguish this capital offense from any other one, the Florida Supreme Court apparently and justifiably believed that such facts were insufficient to uphold the aggravating circumstance, so it relied on the additional facts that the victim knew Mr. Adams and her body was "hidden" (at a frequented garbage site).[31] Adams, 412 So.2d at 856. The district court below relied on the assertion that a kidnapping and rape had occurred[32] and then concluded, without explaining why, that the murder was to prevent Mr. Adams' discovery and conviction. No facts were cited for the basis of the district court's conclusion. Adams v. Wainwright, No. 84-170-CIV, Slip op. at 10-11 (M.D. Fla. Sept. 18, 1984).

The Circuit Court apparently also recognized that the evidence relied on by previous courts was insufficient to establish this aggravating circumstance and therefore cited a previously unrelied upon "fact," a portion of a written statement by Mr. Adams which states "that he put his hand over the victim's mouth to silence her screaming, and she quit breathing." Adams, 764 F.2d at 1366. As previously noted, the inclusion of this additional factor is a novel proposition

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[31]The hiding of the body was later specifically rejected by the Eleventh Circuit as too ambiguous to serve as a basis for upholding this aggravating circumstance. Id. at 1365 n. 9.

[32]No Florida court, however, has found that kidnapping and rape occurred. Instead, they have only found that Petitioner committed or attempted to commit rape and/or kidnapping. Adams v. State, 412 So.2d 850 (Fla. 1982). It is ironic (and telling) that the courts have consistently rejected the motion that the jury could have convicted Petitioner on sex offense grounds, while embracing sex offense as a sufficient basis for the finding of this statutory aggravating circumstance.

first advanced by the Circuit Court.[33]

The pervasive allegations and findings of rape or sex offense in this case also negate a finding of murder to avoid detection. Petitioner continues to maintain that the evidence was insufficient to support a finding of sex offense. Nevertheless, the State argued it, and the jury was instructed at guilt-innocence in such a way as to allow them to convict Petitioner of felony (sex offense) murder. If sex offense/rape was indeed the predicate for the murder, then this aggravating circumstance is unsupportable. As the Florida Supreme Court has recently stated:

> It is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire to avoid detection.

Doyle, 460 So.2d at 358.[34] The result of this unfortunate, but true, finding is that there is no logical basis for the conclusion that this aggravating circumstance has been proven beyond a reasonable doubt.

The Court Court also asserted that the Florida Supreme Court's concern in Doyle, (that the murder could have been the culmination of the same impulses that prompted the rape), is not present in this case because Mr. Adams was charged with kidnapping as well as rape. Adams, 764 F.2d at 1366. This

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[33]If this Court finds this statement to be true, then the State has failed to prove that the victim was killed by the means set forth in the indictment--strangulation. Jiminez v. State, 231 So.2d 26 (Fla. 3d DCA 1970); State v. Ryan, 413 So.2d 411 (Fla. 4th DCA 1982).

[34]The Circuit Court appears to be under the impression that Petitioner is asserting that rape occurred and that strangulation occurred as an integral part of the rape. This is not correct. Petitioner believes that there is no evidence of rape but if rape occurred, the motive for the killing could be as in Doyle. As in Doyle, the court cannot assume or speculate that the motive was to avoid arrest and the avoidance motive was not proven beyond a reasonable doubt. The Circuit Court also stated that Petitioner is asserting that the aggravating factor of killing during the commission of actual or attempted rape and killing to avoid detection and arrest are mutually exclusive. This is also incorrect. They are not mutually exclusive, but because of the nature of rape, and if a rape occurred, the State of Florida has not proven beyond a reasonable doubt that the primary motive for the murder was to prevent detection. Doyle, 460 So.2d at 353.

statement is totally inconsistent with the Circuit Court assertion in disposing of Petitioner's Stromberg claim that the jury could not have found Petitioner guilty of felony-murder because there was allegedly no charge to the jury on felony-murder. Furthermore, as noted above, the trial court found that Petitioner committed or attempted to commit kidnapping and/or rape. Thus, there has been no factual finding by any Florida court that a kidnapping actually occurred.

It must also be emphasized that, simply because a kidnapping occurs in connection with rape, or attempted rape, this does not mean that the hostile-aggressive impulses associated with rape did not occur. Furthermore, the fact that the victim was transported from one location to another does not dispel the distinct possibility that the attempted rape and murder was committed at one location, the result of a single incident of impulsive violence and it is mere speculation to assert otherwise.[35] The distinctions enumerated by the Circuit Court to justify the application of the avoidance motive are simply not supported by the evidence.[36]

B. Godfrey v. Georgia - This Aggravating Circumstance Was Arbitrarily Applied.

The arbitrariness of the application of this circumstance is illustrated by an analysis of the findings in Doyle v. State,

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[35]The lower court's assertion that this is what occurred in Doyle is an assumption which is not contained in the Doyle opinion. Furthermore, under Fla. Stat. §787.01, in order to find kidnapping in this case, the court has to find that the acts in question were for the purpose of committing rape. In fact, little is known of the events immediately preceding the murder. For example, it is not known where the murder took place. Despite the lack of supporting evidence, the decision below allows the sentencer the opportunity to assume the Petitioner's state of mind even when significant facts are not known. Allowing such an assumption to serve as the basis for applying the death penalty is impermissible under the "clear and objective standards" requirement of Godfrey.

[36]The standard for weighing the constitutional sufficiency of the evidence is set forth in Jackson v. Virginia, 443 U.S. 307, 324 (1979). Under Jackson, "[T]he applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Here, no rational trier of fact could have found proof of the avoidance motive was the dominate or only motive for this murder and that it was proven beyond a reasonable doubt based on the evidence in this record.

460 So.2d 353 (Fla. 1984). In Doyle, the appellant was convicted of first degree murder and sexual battery. The victim was a neighbor and relative of the appellant. The victim's body was discovered in an area where the appellant had been dumping tree branches and leaves. The similarities between the circumstances of death in Doyle and the circumstances of death in Adams are readily apparent. Both cases involve the alleged sexual assault of females and the victims knew the defendants. In both cases, it also appears that the bodies were concealed.[37]

Despite the obvious similarities between the two cases, the Florida Supreme Court reversed the trial court's finding regarding the existence of the aggravating factor of avoiding arrest in Doyle but not in Adams. Allowing the application of the aggravating factor in Adams but disallowing it in Doyle cannot be reconciled, except by recognizing the arbitrary application of this factor in the Adams case.[38]

Florida's control of this aggravating circumstance is unconstitutionally inconsistent. In Menendez v. State, 368 So.2d 1278 (Fla. 1979), the State argued that a murder committed by means of a pistol fitted with a silencer indicated a motivation to avoid arrest and detection. The court held that the presumption "carries us too far." Significantly, the court noted that the court could not assume the defendant's motive because "[h]ere, unlike Riley, we do not know what events preceded the actual killings...." Id. at 1282. Menendez correctly recognizes that a sentencer may be afforded too much discretion in cases where little is know of the events preceding the murder. Such discretion fails to adequately channel the sentencer's decision making. Godfrey, 446 U.S. at 428.

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[37]In Doyle, the body was discovered only after a search of an area that was conducive to concealing a body. This is demonstrated by the discovery of a skeleton of another body which was discovered in the same area only after the search for the victim began.

[38]The application of this aggravating factor in this case clearly concerned Justice McDonald. In his dissenting opinion to the denial of Petitioner's post-conviction motion, he specifically referred to the "...highly questionable aggravating factor that Adams killed the eight-year-old to avoid arrest...." Adams v. State, 456 So.2d 888, 891 (Fla. 1984).

Similarly, in this case, little is known about the facts preceding the killing. Previous decisions regarding this case have relied extensively on facts occurring after the killing (i.e., disposing of the body in a desolate area, encasing the body, effectively concealing the body for a period of time), Adams, 412 So.2d at 856, as opposed to before the killing.

Accordingly, the clear and objective standards envisioned in Godfrey are not achieved from the result in this case in light of Doyle, Menendez, and the Florida Supreme Court's recognition that "the murder of a rape victim is all too frequently ... not a reasoned act motivated primarily by the desire to avoid detection." Doyle, 460 So.2d at 358.

Using the standard applied in this case, some judges and juries will recommend death based on the existence of the facts in this case, (e.g., Adams) and others will not (e.g., Doyle and Menendez), and the Florida Supreme Court will stand silent. The standard applied here provides no guidance to a jury or judge to determine when they should or should not recommend death in these circumstances, and the Florida court has failed in its appellate function of ensuring that there is a meaningful basis for distinguishing those cases where the death penalty is imposed from those where it is not. The result is that the death sentence in this case cannot be allowed to stand. The Eleventh Circuit's decision constitutes a clear violation of the principles of Godfrey and should be reviewed by this Court.

IV. THIS COURT SHOULD CORRECT THE CONFUSION AND CONFLICTS IN STATE AND FEDERAL DECISIONS AND EXPLAIN THAT THE EIGHTH AMENDMENT REQUIRES CAPITAL SENTENCING JURY INSTRUCTIONS WHICH CLEARLY AND EXPLICITLY INFORM JURORS OF THEIR OPTION TO RECOMMEND A SENTENCE OF LIFE IMPRISONMENT, AND THIS COURT SHOULD CORRECT THE ELEVENTH CIRCUIT'S INCORRECT DETERMINATION IN THIS CASE THAT THE JURY WAS ADEQUATELY INFORMED OF THE MERCY OPTION.[39]

This Court has held that the eighth and fourteenth amendments require that the capital sentencer not be precluded from considering as a mitigating factor any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for sentence less than death.[40] Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); Bell v. Ohio, 438 U.S. 637, 642 (1978) (plurality opinion). Lockett holds that a jury should be allowed to base its sentence on any "factor[s] which may call for a less severe penalty," even though the mitigating factors do not outweigh the aggravating circumstances.[41] 438 U.S. at 605. Cf. Woodson v. North Carolina, 428 U.S. 280 (1976); King v. Mississippi, 461 U.S. 919 (1983) (Marshall, J., dissenting from denial of

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[39]This claim is presented here directly on the merits. Below, Petitioner presented this point mainly as an ineffective assistance of counsel claim, but noted that the claim should be considered directly on the merits because it involved fundamental constitutional error to which procedural default does not apply. See Petitioner's Eleventh Circuit Initial Brief at 51 n. 13, citing Spivey v. Zant, 661 F.2d 464, 470 (5th Cir. Unit B 1981), cert. denied, 458 U.S. 1111 (1982), and Chenault v. Stynchcombe, 581 F.2d 444, 447 (5th Cir. 1978). Petitioner reasserts that the claim should be considered directly on the merits. Should this Court disagree, Petitioner reasserts counsel was clearly ineffective for failing to raise the point since it involves such fundamental constitutional error.

[40]The Constitution requires that a state death sentencing procedure "allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion). See also Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982).

[41]A jury's unfettered option to recommend life regardless of aggravating circumstances does not result in the unbridled discretionary determinations found wanting in Furman v. Georgia, 408 U.S. 238, 262-63 (1972) and successor cases. See, e.g., Bullington v. Missouri, 451 U.S. 430 (1981) (where there was a Missouri statute giving the jury the option to recommend life, the Court never intimated unconstitutionally); and Gregg v. Georgia, 428 U.S. 153, 199 (1976) (per curiam) ("nothing in any of our cases suggest that the decision to afford an individual defendant mercy violates the Constitution.")

certiorari).

Three members of this Court have previously addressed the issue of whether and how jury instructions must elucidate mercy as a legitimate sentencing criteria. For instance, in Teague v. Tennessee, ___ U.S. _____, 105 S.Ct. 3538 (1985) (Marshall and Brennan, JJ., dissenting from denial of certiorari), Justice Marshall examined the Tennessee statute which provides that once the state proves an aggravating circumstance, the jury has to impose the death penalty, unless they find mitigating circumstances which in fact outweigh the aggravating circumstances. Citing Lockett and Woodson, Justice Marshall emphasized that "a jury must always be free to confront the ultimate question of whether 'death is the appropriate question' in the specific case, even where mitigating factors do not outweigh aggravating factors." Id. at 3539 (emphasis added) (citations omitted). Justice Marshall went on to note that the jury "may wish to vote for life out of a desire to render mercy, or it may believe that the death penalty is simply inappropriate for the specific crime the defendant has committed." Id. Justice Marshall recognized that the statute was likely to mislead sentencing jurors into believing that only the mitigating factors they could label and weigh against aggravating ones could properly be considered.

Similarly, in Smith v. North Carolina, 459 U.S. 1056 (1982), Justice Stephens, writing respecting denial of certiorari, stated that the jury might find under North Carolina's statute that there were "sufficient" aggravating circumstances to impose the death penalty, and the aggravating circumstances outweighed the mitigating circumstances. Nevertheless, he noted the jury might feel that a comparison of the totality of the factors left it in doubt as to the proper penalty. Yet, under the North Carolina law in question, the jury would be

required to impose the death penalty.[42] See also, dissents of Justice Marshall and Brennan, White v. Maryland, ___ U.S. __, 105 S.Ct. 1779 (1985); Maxwell v. Pennsylvania, ___ U.S.___, 105 S.Ct. 370 (1984); Stebbing v. Maryland, ____ U.S. ____, 105 S.Ct. 276 (1984); Jones v. Illinois, ___ U.S. ___, 104 S.Ct. 287 (1983); and King v. Mississippi, 461 U.S. 919 (1983).[43]

A. A Conflict Exists on the Mercy Question.

The Fourth[44] and Fifth[45] Circuits, and prior decisions of the Eleventh[46] Circuit have recognized that a jury must be clearly informed of its option to recommend life, even in the face of aggravating circumstances. These decisions have relied on this Court's precedents cited and discussed above.

The Fifth Circuit has read Lockett and Bell to mandate that the judge clearly and affirmatively instruct the jury about the option to recommend against death. Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978); Spivey v. Zant, 661 F.2d 464, 467-72 (5th Cir. Unit B 1981), cert. denied, 458 U.S. 1111 (1982).[47] Similarly, the Eleventh Circuit has followed its predecessor circuit (the Fifth Circuit) and read Lockett and Bell to require clear and explicit instructions on

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[42]Justice Stephens respected the denial of certiorari for reasons apparently unrelated to the merits. The case was on a direct appeal so the question would still be open for the Court for consideration in collateral proceedings. Id. 459 U.S. at 1057.

[43]Of course, it is Hornbook law that denials of writs of certiorari have no precedential value and the denial of certiorari is not a comment on the merits in the case. See Stebbing v. Maryland, ____ U.S.____, 105 S.Ct. 276 (1984) (Marshall, J., dissenting from denial of certiorari).

[44]Briley v. Bass, 750 F.2d 1238, 1242-44 (4th Cir. 1984).

[45]Spivey, 661 F.2d at 471 and cases cited therein.

[46]Tucker v. Zant, 724 F.2d 882, 891 (11th Cir. 1984), affirmed and considered en banc on other grounds, 762 F.2d 1480, (11th Cir. 1985) and cases cited therein.

[47]In Spivey, the instruction which was held to be unconstitutional contained the same "sufficient" language which was used by the court of appeals in the instant case to uphold the jury instructions (the instant instructions said the jury could consider death if they found "sufficient" aggravating circumstances). Thus, there is a clear conflict between Spivey and the instant case. See pp. 47-50, infra. For a similar case, disapproving almost identical "sufficient" language, see Ruffin v. Zant, 591 F.Supp. 1136, 1140 (S.D. Ga. 1984).

the option to recommend against death. Goodwin v. Balkcom, 684 F.2d 794, 801 (11th Cir. 1982). The instant case reflects the Eleventh Circuit's inconsistent application of this eighth amendment mandate. The Eleventh Circuit's resolution of the issue sub judice conflicts with Fifth Circuit decisions, and this Court's decisions.

Leading decisions of the various states are also in conflict on this point.[48] Similarly, state statutes which address the point are in conflict with decisions of this Court and the Circuit Court opinions cited above.[49] This Court's mandate is necessary since the application of the death penalty is proceeding upon different rules, depending on where the crime occurred or the trial is held--rules which go to the heart of the eighth amendment.

B. The Circuit Court Approved Sentencing Instructions Which Failed to Clearly Inform the Jury of Its Eighth Amendment Mercy Power.

The Circuit Court held that the instructions in this case neither expressly nor implicitly "foreclosed" the jury's ability to exercise mercy and recommend a life sentence. Adams, 764 F.2d at 1368. An analysis of the instructions shows

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[48]Leading cases supporting instructing the jury as to their option to recommend mercy are: People v. Lanphear, 36 Cal.3d 163, 203 Cal. Rptr. 122, 680 P.2d 1081 (1984); People v. Robertson, 33 Cal.3d 21, 58, 188 Cal. Rptr. 77, 655 P.2d 279 (1982); Whalen v. State, 492 A.2d 552, 560-63 (Del. 1985); High v. Zant, 250 Ga. 693, 300 S.E.2d 654, 662 (1983); Smith v. Francis, 253 Ga. 782, 325 S.E.2d 362, 365 (1985); Briley v. Commonwealth, 221 Va. 532, 273 S.E.2d 48 (1980); and State v. Quinlivan, 81 Wash.2d 124, 499 P.2d 1268 (1972).

Cases not supporting the option (despite frequent strong and persuasive dissents) are: State v. Stewart, 104 Ill.2d 463, 473 N.E.2d 1227 (1985); State v. Sully, 219 Kan. 222, 547 P.2d 344 (1976); State v. Watson, 449 So.2d 1321, 1331-32 (La. 1984); Hill v. State, 432 So.2d 427, 441-42, 452-457 (Miss. 1983); Nevius v. State, 699 P.2d 1053 (1985); State v. Williams, 308 N.C. 47, 301 S.E.2d 335 (Nev. 1982); and State v. Jenkins, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984).

[49]There are several states such as Mississippi, Illinois, North Carolina, Pennsylvania and Tennessee which have statutes or jury instructions which do not advise the jury of their option to recommend life, but instead, require the jury to impose the death penalty once they find aggravating circumstances which are not outweighed by mitigating circumstances. See this Court's decisions cited above, and the statutes cited therein.

this holding not only conflicts with prior decisions of this Court and decisions of other circuits but is also incorrect and conflicting even when applying prior decisions of other panels of the Eleventh Circuit.

(1) The Improper Jury Instructions Given Below.

In relevant part, the improper charge to the jury was:

> If you do not find that there existed sufficient[50] of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence to life imprisonment.
>
> Should you find sufficient number of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

(B-4) (emphasis added).[51]

More importantly, while explaining the sentencing phase of trial to prospective jurors during jury voir dire, the trial judge repeatedly told the jury they should weigh aggravating and mitigating circumstances before deciding whether to recommend life or death, and that if aggravating outweighed mitigating, the jury should recommend death. See the trial transcript, Ex. 2 at 30, 127; and Ex. 3 at 231.[52] The judge never advised the jury in any way of the option to recommend life imprisonment even if they found only aggravating circumstances or that the aggravating outweighed the mitigating circumstances.

Several jurors who were ultimately impaneled were in the

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[50] See n. 58, supra as to the inherent ambiguity of the word "sufficient".

[51] See pp. B-2, B-4, and B-6 of the Appendix for the total charge relating to this issue.

[52] For example, after generally defining aggravating and mitigating circumstances, the trial judge stated:

> [Y]ou would then find whether or not, in your opinion, the aggravating circumstances outweigh the mitigating circumstances and, if so, then you would come back and recommend to the Court that this man be put to death. If you found that the mitigating circumstances outweighed the aggravating circumstances, you would come back and recommend to the Court that the Court give him life.

Ex. 2 at 30 (emphasis added). The other explanations were similar. See Ex. 2 at 127 and Ex. 3 at 231.

jury box from the beginning of voir dire and heard all of the repeated explanations.[53]

(2) The Appropriate Standard Regarding Such Instructions.

As discussed above, this Court has indicated that jurors should not be limited in their power to entertain and exercise mercy. The proper standard to be used in analyzing the instructions as to the option to recommend life issue has thus far been left to other courts. Consistent with this Court's opinions, the Fifth Circuit has adopted the following standard: "the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death." Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. Unit B 1981), cert. denied, 458 U.S. 1111 (1982) (emphasis added). This requirement of explicitness and clearness has permeated the Eleventh Circuit cases[54] dealing correctly with this issue.[55]

A corollary to the clear and explicit requirement is that the instruction be clear and explicit to a reasonable juror.[56] In this regard, it is important to note that: "[A] jury will have had little, if any, previous experience in sentencing, [and] they are unlikely to be skilled in dealing with the information they are given." Gregg v. Georgia, 428 U.S. 153,

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[53]Compare Ex. 3 at 343-44 (which lists the twelve jurors actually impaneled) with Ex. 2 at 6-7, 122 and 221 (which shows that eight of twelve jurors heard all or part of these improper instructions given at 30, 127 and 231).

[54]See, e.g., Goodwin v. Balkcom, 684 F.2d 794, 801 (11th Cir. 1982), cert. denied, 460 U.S. 1098 (1983) (the rule requires "explicit" instructions); Chenault v. Stynchcombe, 581 F.2d 444, 448 (the trial judge must "clearly" instruct the jury); and Moore v. Zant, 722 F.2d 640, 646 (11th Cir. 1983) ("this Court has repeatedly emphasized that a trial judge 'must clearly and explicitly instruct the jury about ... the option to recommend against death.'")

[55]The policy reasons for the rule requiring clear and explicit instructions were fully and soundly explained in Spivey. They concern the seriousness of the death penalty, the avoidance of arbitrariness in death sentence cases and the constitutional responsibility to tailor any sentence in a capital case to the defendant's particular circumstances. See Spivey, 661 F.2d at 469-72 and cases cited.

[56]See, e.g., Corn v. Zant, 708 F.2d 549, 562 (11th Cir. 1983) and Tucker v. Zant, 724 F.2d 882, 891 (11th Cir. 1984), affirmed and considered en banc on other grounds, 762 F.2d 1480, (11th Cir. 1985).

192 (1976) (plurality opinion). This is especially true in Petitioner's case: the jury did not have the opportunity to closely analyze each word as the Circuit Court and the district court have previously done because the instructions were orally read only once to the jury.[57]

(3) The Circuit Court Holding is Clearly Erroneous and Conflicts Even with Prior Eleventh Circuit Opinions.

That the instant Circuit Court did not apply the proper standard is shown by the fact that nowhere did the Court mention the constitutionally required "clear and explicit" standard. Instead, the court held the instructions "neither expressly nor implicitly foreclosed the jury's ability to exercise mercy and recommend a life sentence." Adams, 764 F.2d at 1368 (emphasis added). It is simply not enough that the instructions not "foreclose" the option--instead they must affirmatively, explicitly, and clearly advise the jury of their option to recommend life imprisonment even though the jury finds aggravating circumstances or that aggravating circumstances outweigh the mitigating circumstances.

In determining that the jury was not foreclosed, the Circuit Court relied on the fact that the instructions said life imprisonment should be recommended if the jury did not find that "sufficient" aggravating circumstances existed. This is error for three distinct reasons.

First, it is unclear to a reasonable juror what the word "sufficient" defines in the above charge.[58]

Second, as set forth at text pages 46-47 above, the trial judge, while explaining the sentencing phase during voir dire

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[57]In most of the cases discussed herein where instructions on this issue were approved as constitutional (see for instance, the discussion of Spivey and Westbrook below) the jury had the luxury of having the instruction before them in writing.

[58]Does "sufficient" refer to: (1) a sufficient "number" of aggravating circumstances (see the word "number" at B-4 and quoted above); or (2) does "sufficient" mean that the aggravating circumstances must be sufficient beyond a reasonable doubt; or (3) does "sufficient" mean that if the aggravating circumstances are sufficient to outweigh the mitigating circumstances, then death should be recommended? The answer is unclear, especially to a lay jury who hears (not reads) the instruction only once.

repeatedly told the jury they must weigh aggravating and mitigating circumstances before deciding to recommend life or death, and that if aggravating outweighed mitigating the jury must recommend death. Not once, during all of these repeated instructions did the judge ever mention any requirement that the aggravating circumstances had to be "sufficient" to impose death before they were required to weigh mitigating circumstances. Thus, if the jury found any aggravating circumstances at all (whether or not "sufficient" to impose death) they would have felt compelled to impose death if they found no mitigating circumstances or that the mitigating circumstances did not outweigh the aggravating circumstances found.[59]

Third, it is not enough to simply tell the jury that they should recommend life if they do not find "sufficient" aggravating circumstances. The jury should be advised that they can exercise mercy even if the aggravating circumstances are "sufficient" to impose death.

Rather than being given a clear instruction on the option to recommend life despite aggravating circumstances, the jurors were given just the opposite impression, because they were repeatedly instructed that if sufficient aggravating circumstances were found, they must find mitigating circumstances that outweigh them before they could recommend life.[60] At best, the instructions are subject to differing interpretations. At worst, the instructions affirmatively charged the jury

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[59]These early instructions would have had a much higher impact on the jury than the later final charge given. It was the juror's first impression of the case and it was repeatedly given.

[60]In addition to the repeated early voir dire instructions, the jury was instructed three more times during the final charge that if sufficient aggravating circumstances were found, they must consider whether mitigating circumstances existed to outweigh the aggravating circumstances before they could recommend life (B-2, B-4, B-6).

incorrectly.[61] Due process in a death penalty case requires more.[62]

Last year, in Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984), the Eleventh Circuit addressed a similar instruction. The relevant instruction in Morgan was:

> I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution for the offense of murder, you must find upon the evidence statutory aggravating ... circumstances sufficient to authorize such penalty.

Id. at 778 n. 1 (emphasis added). The similarities in this instruction to the instruction in the instant case are obvious. Both refer to the necessity of finding "sufficient" aggravating circumstances before death can be recommended. Neither instruction explicitly (or even implicitly) tells the jury of their option to recommend mercy. Yet, the instruction in the instant case was upheld while the instruction in Morgan was rejected, Morgan, 743 F.2d at 779.[63]

All but one of the Eleventh Circuit cases upholding jury instructions as properly advising as to the option to recommend

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[61]Prejudice can be easily perceived in the instant case. The aggravating and mitigating factors found by the trial judge were closely balanced three to three. The jury may have felt that the aggravating circumstances outweighed the mitigating, but yet desired to recommend life. Nevertheless, because of the instructions, the jurors were foreclosed from recommending life if the aggravating slightly outweighed the mitigating. By a bare margin, the Florida Supreme Court upheld the death sentence (4-2 decision).

[62]The error below is not merely a technical one. Despite all the constitutional and procedural safeguards in capital cases, the state may be wrong. See, e.g., Leatherwood v. State, 435 So.2d 645, 662 (Miss. 1983) (Robertson, J. dissenting) noting that "jury nullification" has been a part of the criminal justice system for hundreds of years, and then listing a sampling of six documented cases in which death sentences were imposed, though not carried out, upon persons later found not guilty. In addition, there may be non-fact considerations which render it clear beyond a reasonable doubt that the Defendant's life should be spared. The jury must be allowed to dispense mercy on the basis of factors too intangible to write into a statute or jury instruction. See Gregg v. Georgia, 428 U.S. 153, 222 (1976). A jury's decision necessarily implicates the most fundamental notions concerning the uniqueness, dignity, and worth of a human being. The juror's unique sense of justice and fairness as reflected by societal standards is always tested.

[63]For other cases disapproving instructions similar to or even clearer than the instant case, see Goodwin, 684 F.2d at 794 and Spivey, 661 F.2d at 464. Note especially the use of the word "sufficient" in the instructions in those cases.

life were upheld only because, unlike the instant case, the instructions at issue contained clear and explicit language advising the jurors of their option to recommend life.[64]

These decisions illustrate the need for this Court to (1) clarify and reaffirm that instructions must clearly and explicitly advise the jury of the option to recommend life; and (2) closely review the jury instructions in the instant case and hold they did not properly advise the jury of the option to recommend mercy.

V. PETITIONER WAS IMPROPERLY DENIED AN EVIDENTIARY HEARING ON HIS CLAIM THAT HE WAS INCOMPETENT TO STAND TRIAL AND BE SENTENCED TO DEATH, AND ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND THE CIRCUIT COURT OPINION CONFLICTS WITH TOWNSEND V. SAIN, 372 U.S. 293 (1963).

A. Petitioner Was Improperly Denied An Evidentiary Hearing Regarding His Incompetence to Stand Trial And His Incompetence to Participate in The Sentencing Phase of a Capital Case.[65]

(1) The Standard for a Hearing and Confusion Below as to the Standard.

In Townsend v. Sain, 372 U.S. 293, 312 (1963), this Court held that a district court has the power to "receive evidence and try the facts anew" where a state prisoner "alleges facts which, if proved, would entitle him to relief." The Court then considered when an evidentiary hearing would be mandatory.

Where the facts are in dispute, the federal

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[64] See, e.g., Westbrook v. Zant, 704 F.2d 1487, 1503 (11th Cir. 1983); Corn v. Zant, 708 F.2d 549 (11th Cir. 1983); Tucker v. Zant, 724 F.2d 882, 891 (11th Cir. 1984), affirmed and considered en banc on other grounds, 762 F.2d 1480, (11th Cir. 1985); Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984); and Moore v. Zant, 722 F.2d 640 (11th Cir. 1983). The one exception is the recent decision of Proffit v. Wainwright, 756 F.2d 1500 (11th Cir. 1985). That decision is simply incorrect, just as the court of appeal's instant decision is incorrect.

[65] It must be remembered that Petitioner sped through state trial court, the Florida Supreme Court, the federal district court, and into the Eleventh Circuit before obtaining a stay. See Statement of the Case, supra. Along the route to this Court, three courts adopted the erroneous proposition that Petitioner had waived the right to claim incompetence at trial. One cannot waive such a fundamental right, and it is assertable in post-conviction proceedings. Pate v. Robinson, 383 U.S. 375, 386 (1966); Drope v. Missouri, 420 U.S. 162, 174-75 (1975); Dusky v. United States, 362 U.S. 402 (1960). Therefore, the previous rulings on this claim are certainly not reliable.

> court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words, a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found relevant facts.

Id. at 312-313 (emphasis added).

The Townsend standard for a hearing has been applied consistently where factual questions arise in federal habeas proceedings no matter what particular constitutional issue is presented.[66]

A competency issue should be resolved through evidence and testimony, as required by Townsend. In this area where testimony is crucial, the Fifth Circuit and, following it, the Eleventh Circuit, have developed a higher standard for granting an evidentiary hearing when incompetency at the time of trial is alleged than that laid down in Townsend. The Eleventh Circuit requires habeas petitioners to virtually prove the incompetency claim before an evidentiary issue is allowed, rather than allowing an evidentiary hearing when "facts are in dispute." How this paradox developed is outlined in subsection 2, infra.

Other federal circuit and district courts do not make this unwarranted distinction between the right to an evidentiary

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[66]Boyd v. Dutton, 405 U.S. 1 (1972) (whether defendant knowingly and voluntarily waived his constitutional right to counsel before entering his guilty plea); Walker v. Wilmot, 603 F.2d 1038 (2d Cir. 1979) (whether confession was voluntary); Pierce v. Cardwell, 572 F.2d 1339 (9th Cir. 1978) (whether right to counsel violated and whether prosecution used perjured testimony); White v. Estelle, 556 F.2d 1366 (5th Cir. 1977) (whether plea agreement breached); Schneider v. Estelle, 552 F.2d 593 (5th Cir. 1977) (whether state knowingly used perjured testimony at trial); Gunsby v. Wainwright, 552 F.2d 127 (5th Cir. 1977) (whether inculpatory sworn statement was part of a plea bargain and therefore admissible against defendant at trial); Mason v. Balcom, 531 F.2d 717 (5th Cir. 1976) (whether defendant received effective assistance of counsel at trial); Austin v. Swenson, 522 F.2d 168 (8th Cir. 1975) (whether state prosecution withheld material evidence); United States ex. rel Mattox v. Scott, 507 F.2d 919 (7th Cir. 1974) (whether defendant's right to counsel during custodial interrogation violated); Wesley v. Alabama, 488 F.2d 30 (5th Cir. 1974) (whether defendant denied right to counsel and whether guilty plea coerced); Rhynes v. Wainwright, 480 F.2d 561 (5th Cir. 1973) (whether counsel present at sentencing); United States ex rel. Griffin v. Vincent, 359 F.Supp. 1072 (S.D.N.Y. 1973) (whether sentence imposed was of undue length).

hearing on incompetency at trial and other issues raised in federal habeas proceedings. These courts have, quite appropriately, applied the Townsend standard to grant or deny an evidentiary hearing on the Petitioner's competency to stand trial.[67] A claim of incompetency to stand trial or to be sentenced is necessarily a highly fact bound and complicated issue, requiring explanation by experts for a full evidentiary basis. As this Court has recently underscored, psychiatric and mental health issues are peculiarly suited for testimony: "[t]hrough...a process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination of the mental condition of the defendant...." Ake v. Oklahoma, _____ U.S. _____, 84 L.Ed.2d 53, 64 (1985) (emphasis added). Judges, no less than jurors, need this testimonial assistance.

(2) Eleventh Circuit Restrictions on Incompetency Hearings.

The restriction on evidentiary hearings had its genesis with Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973) ("Bruce I"). In that case, the petitioner had litigated in state post-conviction proceedings the issue of competency to stand trial. The federal district court found that the competency issue was fairly resolved by the state court and dismissed the petition. In reversing the district court, the Fifth Circuit correctly framed the issue: Under the Townsend standard, there was a duty of the federal court to review the state court proceedings to determine whether they were conducted in a manner which would fairly adduce the facts surrounding petitioner's claims. Id. at 1038. Finding that the state pro-

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[67] Speedy v. Wyrick, 702 F.2d 723 (8th Cir. 1983); Suggs v. LaVallee, 570 F.2d 1092, 1109, 1114 (2d Cir. 1978); United States ex rel. Phelan v. Brierley, 453 F.2d 73, 96-97 (3d Cir. 1971) (Gibbons, J., dissenting) (Dissent notes that majority apparently agrees that an evidentiary hearing was required under Townsend); McCollum v. Sullivan, 507 F.Supp. 865, 868-869 (D.Del. 1981); Pierce v. Oklahoma, 436 F.Supp. 1026, 1032 (W.D. Okla. 1977); See also Vincent v. Louisiana, U.S. 105 S.Ct. 928 (1985) (Brennan and Marshall, JJ., dissenting); Meeks v. Smith, 512 F.Supp. 335 (W.D.N.C. 1981) (correct standard applied without mentioning Townsend).

ceedings had been inadequate, the Fifth Circuit remanded to the district court for further proceedings. In conclusion, the Fifth Circuit Court added language which is apparently the genesis of much of the Fifth and Eleventh Circuits' confusion about the issue:

> We consider it appropriate to add a caveat with respect to cases of this type. Courts in habeas corpus proceedings should not consider claims of mental incompetence to stand trial where the facts are not sufficient to positively, unequivocally, and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during a criminal trial. While the factual pattern will vary from case to case, the instant case illustrates the standard which should be met to sustain such a claim, viz. a history of mental illness, substantial evidence of mental incompetence at or near the time of trial supported by the opinions of qualified physicians and the testimony of laymen. The burden is on the petitioner to prove his allegations; such proof should be clear and convincing.

Id. at 1043 (emphasis added).

This passage reveals that the court was referring only to the burden of proof that a petitioner must meet in order to prove the claim that he was incompetent at trial once a hearing is granted, not the standard for determining whether a litigant gets a hearing. First, the court clearly talks in terms of "sustain[ing] such a claim." Id. (emphasis added). Furthermore, as noted above, the court recognized and applied the Townsend standard for granting a hearing on incompetency in the case before it. Id. at 1038. Finally, the court, in another portion of its opinion, spoke directly to the issue of when a hearing is required in cases where an issue of incompetency to stand trial is raised:

> A petitioner is not automatically entitled to a hearing on his mental incompetency. He must set forth sufficient facts in his petition from which the court can properly determine that there is a need for such a hearing.

Id. at 1037, n.16 (emphasis added). In making this statement, the court relied on a number of 28 U.S.C. §2255 (federal post-conviction relief statute) cases which found that the allegations of incompetency at trial in the post-conviction

petition were sufficient to require a hearing.

In sum, Bruce I simply followed Townsend in determining whether an evidentiary hearing should be granted. If Bruce I added anything new, it was the "caveat" that, once an evidentiary hearing is granted, the federal district courts should not find incompetency at trial absent the petitioner's meeting a high standard of proof. Ironically, Bruce I became cited for much more.

Bruce I was followed by Bruce v. Estelle, 536 F.2d 1051 (5th Cir. 1976)("Bruce II"). In that case, an entirely different Fifth Circuit panel considered the "caveat" paragraph of Bruce I and determined:

> [W]e read the prior panel's caveat as referring only to the petitioner's threshold burden of proof which must be satisfied before the habeas court has a duty to investigate the constitutional challenge further. Once petitioner has come forward with enough probative evidence to raise a substantial doubt as to competency, however, his task is not complete. He must then go further and prove the fact of incompetency, at least by a preponderance of the evidence.

Id. at 1059 (emphasis added).

The court failed to explain why the normal Townsend standard for granting a hearing would no longer apply and what possible reasoning lay behind requiring habeas petitioners to prove by "probative evidence" a substantial doubt about their incompetency prior to their being allowed a hearing on the issues of competency in fact.[68] Later Fifth and Eleventh Circuit opinions uncritically followed this standard,[69] as did the Eleventh Circuit opinion in the case sub judice:

> As a matter of procedural due process, a criminal defendant is entitled to an evidentiary hearing on his claim of incompetency

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[68]In Zapata v. Estelle, 585 F.2d 750 (5th Cir. 1978) (en banc), the Fifth Circuit "explained" the standards of proof set out in Bruce I and Bruce II: Once a habeas petitioner raises a substantial doubt about his competency to stand trial by clear and convincing evidence, and thereby entitles himself to a hearing, he may prove incompetency in fact at the hearing by a preponderance of the evidence.

[69]But not exclusively. Cf. Davis v. Alabama, 545 F.2d 460, 465-466 (5th Cir. 1977) (Court quotes from Bruce "caveat" paragraph but looks only to allegations of petition to see if standard met).

> if he presents clear and convincing evidence to create a "real, substantial and legitimate doubt as to [his] mental capacity...to meaningfully participate and cooperate with counsel. . . ." Bruce v. Estelle, supra, 483 F.2d at 1043; See also Zapata v. Estelle, supra, 588 F.2d at 1021-22; Nathaniel v. Estelle, supra, 493 F.2d at 798. The standard of proof is high. The facts must "positively, unequivocally, and clearly generate" the legitimate doubt. Bruce v. Estelle, supra, 43 F.2d at 1043; see also, Pride v. Estelle, 649 F.2d 324, 326 (5th Cir. 1981) (requiring "more than a showing by a preponderance of the evidence" that the petitioner might have been incompetent at the time of the state trial).

Adams v. Wainwright, 764 F.2d 1356, 1360 (11th Cir. 1985) (emphasis added). This paragraph reveals the absolute confusion and obfuscation generated by Eleventh Circuit competency law.

(3) Under Townsend, An Evidentiary Hearing is Required.

Under this Court's clear Townsend standard, an evidentiary hearing was required upon Petitioner's allegations. First, there is no question that there has never been an evidentiary hearing on Petitioner's competency to stand trial at any stage of the original criminal trial and appellate review or during these collateral proceedings. Petitioner has been foreclosed, at every step, from putting on any evidence of mental incompetency. Petitioner's death warrant was signed on August 21, 1984, with execution scheduled to take place between noon on September 13 and noon September 20, 1984. Petitioner had no realistic opportunity to present his claims by way of post-conviction relief proceedings until the death warrant was signed, as he had no attorney from the time of his clemency hearing until undersigned counsel undertook his representation pursuant to the Florida Bar program. The haste with which counsel necessarily must act in death penalty cases, together with the lack of an opportunity for discovery (which was requested) or to present evidence, operate to make it nearly impossible to meet the heavy burden of proof required by the Eleventh Circuit to get a hearing on incompetency in fact.

Other than the report upon which the allegations of the amendment to the federal petition for writ of habeas corpus were based, all factual allegations concerning incompetency

necessarily had to be based upon pre-existing evaluations and the knowledge of the trial participants. Nevertheless, the evaluations are compelling. In the state post-conviction relief proceeding, the court refused to allow Petitioner's counsel to present even legal argument on the issues. (Ex. 25 at 289-303). In the district court, Judge Moore held a non-evidentiary hearing on the petition for writ of habeas corpus. (I-1)(G-3). Having demonstrated that no evidentiary hearing has been held, the remaining questions are whether the facts are in dispute, and whether, assuming Petitioner's allegations are true, he would be entitled to relief. Townsend, 372 U.S. at 312-13.

In the motion for post-conviction relief filed with the sate trial court, Petitioner alleged that he was incompetent to stand trial or to competently assist his trial counsel. (Ex. 25 at 19). In support of that allegation, Petitioner pled that:

> expert opinion will show that the Defendant has mental disorders that renders [sic] him incapable of recalling traumatic experiences which are unacceptable and undesirable to his conscience perception of himself. The mental disorder, known as catathymic amnesia, has rendered the Defendant incapable of aiding his counsel.

Id. at 34 (emphasis added).

The state court denied Defendant's post-conviction relief petition in an Order dictated to the court reporter. Id. at 295-96. The ruling was based upon the erroneous belief that Petitioner had waived his right to present the issue through post-conviction proceedings. Id. at 299-300. No evidentiary hearing was allowed and there was not even a review of the record as to this issue because "waiver" foreclosed the necessity of an inquiry merits.

Following the state trial court's denial of his motion for post-conviction relief, Petitioner appealed to the Florida Supreme Court and, in addition, petitioned the Florida Supreme Court directly for a state writ of habeas corpus, alleging ineffective assistance of appellate counsel. That court, like the state trial court before it, found the incompetency

claim to have been waived. Then, in dictum and without a hearing, the Florida Supreme Court determined that "the testimony that is being offered is a diagnosis of Adams' present condition and is not evidence that he suffered from this disorder at the time of the trial." Adams, 456 So.2d at 890. The origin of the term "testimony" is unclear as, again, no evidentiary hearing was allowed in the state post-conviction proceedings. The court's opinion that the evaluations showed only current incompetency involves a question of fact; the petition had pled otherwise.

In his petition for a writ of habeas corpus before the federal district court, Petitioner again pointed to the fact that his trial counsel had specifically told the state trial court post-trial that Petitioner was unable to assist his counsel at trial because he could not remember information concerning the crime which could assist in his defense. Furthermore, Petitioner specifically alleged that post-conviction evaluations by psychologists and the psychological screening report prepared by the Florida Department of Offender Rehabilitation would prove that he had mental disorders which rendered him incapable of recalling traumatic experiences. These reports showed a diagnosis of:

1. Catathymic amnesia;
2. Significant personality disturbance;
3. Hostile, perhaps paranoid, tendency;
4. An inability to appropriately control emotion;
5. Sexual immaturity;
6. A considerable history of sexual difficulties and abnormalities onsetting at puberty; and
7. From his past behavioral history Petitioner appears passive aggressive, with strong psychopathic sexual episodes.

(R-31)(footnotes omitted).

In an amendment to his federal habeas petition, Petitioner alleged that if he were granted an evidentiary hearing he would present evidence that, at the time of the crime, he was psychotic and paranoid, he had impaired judgment as a result of a mental disorder, and he was unable to control his actions or to conform them to the requirements of the law. He further alleged he would

show that this evidence should have been discovered and presented to the trial court during the sentencing phase of his trial, as a part of his argument that his trial counsel failed to adequately investigate, develop and present evidence in mitigation in the sentencing phase of Petitioner's trial. (R-211-12). Despite these verified allegations, Petitioner was once again denied an evidentiary hearing.[70]

The district court resolved the evidentiary issues without an evidentiary hearing by relying heavily on Petitioner's trial counsel's pre-trial statement that he knew of no evidence at that time to suggest that Petitioner was incompetent, and that it would therefore be improper for the court to order a competency examination. The Eleventh Circuit, however, discounted this reason because the psychological testing of Petitioner was not sufficiently complete at that time for the attorney to conclude that no claim of incompetency would be raised. The Eleventh Circuit also refused to accept the district court's determination that counsel's post-trial statement regarding Petitioner's lack of competency was "self-serving". However, the Eleventh Circuit did conclude that counsel's statement did not meet the incompetency standard set out in Dusky v. United States, 362 U.S. at 402, because "it is possible for a defendant to have no recall of his involvement in a crime and yet fully understand the proceedings against him and cooperate meaningfully with his attorney in his defense." Adams, 764 F.2d at 1361. The Eleventh Circuit assumed without evidence that Petitioner fully understood and assisted.

The Eleventh Circuit also accepted without criticism the Florida Supreme Court's and district court's characterization of the psychological "testimony" as relating only to Petitioner's present condition. In especially strange comments regarding a petitioner who had been denied an evidentiary hearing at every step, the Eleventh Circuit stated that the "evaluation

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[70]The district court found alternatively that Petitioner had waived his competency claim. The Eleventh Circuit correctly determined that such a claim is not subject to waiver.

does not even appear to have been made part of the record on appeal, and thus we are unable to consider its content" and that the State's assertion that the evaluation speaks only to present condition "stands unrebutted." Adams, 764 F.2d at 1361, 1367 n.14. Petitioner pleads for the opportunity to rebut the unfounded "assertions" by the State.

The pleadings fairly raised the competency issue, and a hearing should have been afforded. This disagreement between the district court and the Eleventh Circuit as to the facts and their import demonstrates that there do indeed exist disputes as to the facts underlying Petitioner's claim of incompetency.[71]

(4) Assuming Proof of the Allegations at a Hearing, Petitioner Will be Entitled to Relief.

The only remaining issue, then, is whether, if Petitioner proves the allegations of his petition, he would be entitled to relief. The Eleventh Circuit, while recognizing the Dusky standard for incompetence at trial, found that Mr. Adams' inability to provide information to his counsel which would assist in his defense did not meet that standard as "it is possible for a defendant to have no recall of his involvement in a crime and yet fully understand the proceedings against him and cooperate meaningfully with his attorney in his defense." Adams, 764 F.2d at 1361. This holding fails to comport with two constitutional mandates -- that no legally incompetent defendant be made to defend himself and that exacting procedural safeguards attend the sentencing phase of a death penalty case.

Trial and conviction of a legally incompetent defendant violates his right to due process of law. Drope v. Missouri, 420 U.S. 162 (1975). To determine whether a defendant is competent, the Supreme Court of the United States has fashioned the following test: Does this defendant have a present ability to consult with his lawyer with a reasonable degree of rational

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[71] A determination of whether Petitioner was incompetent to stand trial involves the application of the constitutional due process standard to the underlying facts. Drope v. Missouri, 420 U.S. 162, 174-175 (1975).

understanding and does the defendant have a rational and factual understanding of the proceedings. Dusky v. United States, 362 U.S. 402 (1960).

In a death penalty case, incompetency takes on an added dimension: this Court has dictated a heightened level of procedural safeguards in order to ensure that death, "punishment unique in its severity and irrevocability," is not imposed arbitrarily or capriciously. Gregg v. Georgia, 428 U.S. 153, 187 (1976), citing, Furman v. Georgia, 408 U.S. 238, 286-291 (Brennan, concurring). In formulating those procedural safeguards the Court has, understandably, given considerable attention to the sentencing phase of a capital case:

> [T]he concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Gregg, 428 U.S. at 195 (emphasis added).

While Petitioner was able to recall some details of the crime some six to seven months prior to his trial, a capacity which diminished even as he made his confession (Ex. 9, 1098-1102), by the time he was tried in state court, Petitioner fit exactly the scenario envisioned by the Circuit Court -- no recall.[72] This left Petitioner helpless to rebut any of the aggravating factors argued for by the state at the penalty phase of the trial.

As the United States Supreme Court has recognized on more

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[72]The Eleventh Circuit found it "highly significant" that petitioner's counsel did not raise a competency claim at trial or sentencing. Adams, 756 F.2d at 1358. Counsel undoubtedly realized Petitioner's inability to recall and the Eleventh Circuit accepted counsel's statement to this effect as true. Id. What trial counsel failed to realize was the legal significance of this lack of recall as it affected the penalty phase of the trial. Based on the record in this case, to conclude Petitioner was competent merely because his counsel did not raise the issue is pure conjecture. See Pate v. Robinson, 383 U.S. 375, 386 (1966).

than one occasion, failure of the trial court to consider all factors relating to the defendant's character, record and circumstances of the offense in sentencing

> creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the demands of the eighth and fourteenth amendments.

Lockett v. Ohio, 438 U.S. 586, 605 (1978); see also, Eddings v. Oklahoma, 455 U.S. 104 (1982); Bell v. Ohio, 438 U.S. 637 (1978). The constitutional injury is no less grievous when the defendant is prevented from presenting evidence in mitigation, or from contesting the state's evidence of aggravating circumstances, when the omission of crucial evidence is due to the defendant's inability to recall his involvement in the crimes, and the court fails to intervene with a finding of incompetence.

The significance of Petitioner's inability to recall becomes evident when one considers that whether Petitioner was sentenced to death depended on the evidence of aggravating and mitigating circumstances considered at the penalty phase of the trial. The trial court found three aggravating circumstances: That the capital felony was committed while Petitioner was engaged in or attempting to engage in, or in the flight after committing or attempting to commit rape and/or kidnapping; that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and that the capital felony was especially heinous, atrocious or cruel.

Petitioner was unable to recall the events, and so was unable to rebut these findings. Because, in order to impose the death penalty under Florida law the aggravating factors must outweigh the mitigating ones, and because there were three mitigating factors found, Petitioner's catathymic amnesia quite possibly serves as the difference between a sentence of death and a sentence of life imprisonment in this case. Fla. Stat. § 921.141.

If the elaborate sentencing procedures suggested in Furman and approved in Gregg are to function properly, the sentencing

authority must, as stated in Gregg, be given all the relevant facts in order to make an informed, as opposed to arbitrary, sentencing decision. Gregg, 428 U.S. at 189-193. Where the criminal defendant is unable, because of a medically recognized mental defect, to put on evidence to refute the state's evidence of aggravating circumstances, the system fails because a fully informed decision is not possible. This is especially true where, as here, the aggravating circumstances involve subtle questions of intent and purpose. Not only was Petitioner prevented by his catathymic amnesia from putting on evidence of what actually occurred, he could not respond to charges that he intended to rape or kidnap the victim, that he committed the capital felony with the intent of avoiding arrest, or that the murder was performed in a manner that purposely caused suffering to the victim or pleasure to him. Petitioner was as helpless in the face of the jury's and judge's consideration of these issues as if he had been refused by the court an opportunity to speak in his behalf at the sentencing phase of the trial, a situation which would undoubtedly cause immediate reversal by this Court. Futhermore, the lack of an adequate factual basis upon which to determine whether aggravating factors were present invites the sort of arbitrary and capricious decision-making condemned in Gregg and Furman.[73]

B. Petitioner Was Improperly Denied An Evidentiary Hearing Regarding Ineffective Assistance of Trial Counsel.

In addition to having been denied a hearing on his claim of incompetency to stand trial, Petitioner has been denied a hearing on his claim of ineffective assistance of counsel. The standard for a hearing, set out by this Court in Townsend has been discussed in detail above. Briefly, a hearing is

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[73]It is worthy to note in this regard that the dissents from the opinions of the Florida Supreme Court on both direct appeal and on appeal from the trial court's denial of Petitioner's motion to vacate his conviction and sentence found the aggravating circumstances, as determined by the trial court, unconvincing, unsupported, and insufficient for a death sentence. Adams v. State, 412 So.2d 850, 857 (Boyd, J., concurring and dissenting), Adams v. State, 456 So.2d 888 (Fla. 1984) (McDonald, J., dissenting).

mandatory where (1) there was an inadequate state court hearing on the issue raised, (2) there are facts in dispute and (3) the petitioner alleges facts which, if proved, would show that he is entitled to relief. Townsend, 372 U.S. at 312. In this case, Petitioner never received a state court hearing and so the district court necessarily found that there had been no full and fair hearing, and the state has never challenged that finding. (I-25) (Eleventh Circuit, Brief for Respondents-Appellees, at 31).[74] Accordingly, Petitioner will address only the second and third Townsend requirements.

Mr. Adams alleges two general types of information which counsel failed to properly investigate, develop and present evidence: (1) Petitioner's incompetency to stand trial or, alternatively, to participate in the sentencing phase of his trial, and (2) mitigation evidence in the sentencing phase of Petitioner's trial.

(1) The Standard Regarding Effective Assistance of Counsel.

The proper constitutional standard for an attorney's performance is "reasonably effective assistance." Strickland v. Washington, 466 U.S. 688, 80 L.Ed.2d 674, 693 (1984). A defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Id., 80 L.Ed.2d at 697. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., 80 L.Ed.2d at 698. Whether Petitioner received reasonably effective assistance of counsel is a mixed question of law and fact. Id., L.Ed.2d at 700. With regard to the duty to investigate and develop possible defenses, this Court said in Strickland that "counsel has a duty to make reasonable investigations or to make a

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[74]The lack of a full and fair state court hearing also means that any state court findings of fact as to this issue are not subject to the deference requirement of 28 U.S.C. §2254(d).

reasonable decision that makes particular investigations unnecessary." Id., 80 L.Ed.2d at 695. See also Davis v. Alabama, 596 F.2d 1214, 1219 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978).

Several factors combine in this case to require counsel to conduct the most thorough of investigations. First, this Court has recognized the unique role played by the sentencing phase of a death penalty case because, as noted in Gregg v. Georgia, 428 U.S. 153, 187 (1978), death is "a punishment unique in severity and irrevocability". See also Strickland, 80 L.Ed.2d at 693. Second, this Court has recently noted the crucial importance of testimony by mental health professionals, such as psychologists and psychiatrists, at the sentencing phase of a death penalty case. Ake v. Oklahoma, ___U.S.___, 84 L.Ed.2d 53 (1985). Ake is in accordance with the recognition by the federal courts of the importance of putting on all available mitigating evidence, because it is with such evidence that the delicate balance between a sentence of life imprisonment and a sentence of death lies. See Lockett v. Ohio, 438 U.S. 586 (1978)(plurality opinion); Bell v. Ohio, 438 U.S. 637, 642 (1978); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985). Third, where a defendant is unable to recall information important to his defense, there is a heightened degree of duty on the part of counsel to develop other sources of evidence in support of that defense. Davis v. Alabama, 596 F.2d 1214, 1219 (5th Cir. 1979).

(2) Counsel Made Unreasonable Omissions Which Prejudiced Mr. Adams.

Applying this heightened level of investigative duty on co' sel's part during a capital case, especially the sentencing phase of that case, it is clear that Mr. Adams' trial counsel's failure to develop evidence concerning his incompetency to stand trial, to present the evidence he did have to show incompetency, especially to participate in the sentencing phase of this trial, and his failure to investigate and present

evidence in mitigation during that sentencing phase, caused his representation to fall below that of reasonable effectiveness. Mr. Adams would prove as much at a hearing. Had it not been for these errors, there is a reasonable probability that the result of the proceeding would have been different.

In order to more fully understand why these omissions constituted ineffective assistance of counsel, one must first understand what the mitigating evidence showed during the sentencing phase of Petitioner's trial. The state trial court found as mitigating factors Petitioner's young age, lack of significant criminal history, and that Petitioner was under the influence of extreme mental or emotional disturbance at the time of the crime. This latter finding was apparently based in part on the testimony of Dr. Arthur Sullwold, who had examined Mr. Adams on April 27, 1978, over five months before trial. (Ex. 8 at 1394). Dr. Sullwold formed the opinion that, at the time of the crime, Mr. Adams was under the influence of extreme mental or emotional disturbance (Ex. 8 at 1396). He also testified that he would not expect that Mr. Adams would appear out of the ordinary in the recent past, while he was in jail. (Ex. 8 at 1399).

In order to impose the death penalty under Florida law, the court must find that aggravating factors outweigh mitigating ones. Fla. Stat. § 921.141. Here, the trial court found three aggravating factors and, as noted above, three mitigating factors. Based on this, the trial court found that aggravating circumstances outweighed the mitigating ones and that the sentence of death could be imposed under Florida law.

While defense counsel presented evidence, of, and the trial court found, that Mr. Adams committed this "capital felony...while...under the influence of extreme mental or emotional disturbance" Section 921.141(6)(b), Florida Statutes, there was no development of testimony regarding the closely allied mitigating factor set out in Section 921.141(6)(f), Florida Statutes:

> The capacity of the Defendant to appreciate the criminality of his conduct or to

> conform his conduct to the requirements of law was substantially impaired.

Nor was there any development of other testimony which would have been relevant to the finding of mitigating factors not specifically set out in the statute but which are allowed consideration by the sentencing court. Fla. Stat. § 921.141(1).

In addition, despite the professional opinion of prior "extreme mental or emotional disturbance", counsel conducted no independent investigation of Petitioner's trial competency and requested no competency hearing. This omission becomes even more striking when one notes that counsel himself stated following trial that "prior [to] and during the trial, Dennis Adams could not remember and therefore could not provide information concerning the killing that would assist with his defense." (Ex. 15 at 133 - the presentence investigation report). A hearing is necessary to prove these claims.

As noted by the court in Strickland:

> When a defendant challenges a death sentence ...the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

80 L.Ed.2d at 698 (emphasis added). Petitioner has pled, in his amended federal habeas petition, that if given a hearing he could present a professional diagnosis that his condition affected his ability to conform his conduct to the requirements of the law. Given that fact, as well as the other evidence now available showing Petitioner's mental state, and the potential for development of such evidence into one or more unenumerated mitigating factors under Section 921.141(1), Florida Statutes, there is a reasonable probability that a reasonable investigation would have revealed to defense counsel this picture of Mr. Adams' mental state. Assuming, as this Court must under Townsend, that such allegations can be proved, certainly there is a "reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death" given the near equipoise of the aggravating and mitigating circumstances found

by the sentencing court in this case.

Similarly, though Mr. Adams' trial counsel recognized that Petitioner could not remember details sufficient to aid in his defense, trial counsel failed to understand the legal significance of that situation. That Petitioner's inability to recall the events surrounding the crime made him unable to defend himself against the state's evidence of aggravating circumstances, the legal implications of that inability under Drope and Dusky, and the factual questions raised, are discussed extensively under Petitioner's argument that he is entitled to a hearing on incompetency and will not be repeated here. In light of Petitioner's allegations of incompetency, based on post-conviction psychological evaluations, together with counsel's clear recognition of Petitioner's inability to recall the events surrounding the crime, there is a reasonable possibility raised that, had Petitioner's counsel properly evaluated the legal significance of that inability to recall and requested a competency hearing, Petitioner would have been found incompetent to stand trial.

These points highlight, in addition, the factual disputes raised in this case which require a Townsend hearing. Because Petitioner has never been given a hearing on the issue of ineffectiveness of counsel, neither Petitioner, his trial counsel or his mental health experts, have ever been allowed to testify. This lack of testimony leaves unresolved questions concerning both Mr. Adams' mental state at the time of the crime and at the time of trial and the reasons for counsel's failure to develop evidence of Mr. Adams' incompetency to stand trial and mitigating factors at the sentencing phase of this trial. It cannot be said on the basis of this record that the facts then available to counsel simply did not warrant such an investigation. Again, Dr. Sullwold's testimony clearly states that Petitioner suffered from "extreme mental or emotional disturbance" at the time of the crime. Furthermore, there is now available expert testimony that Petitioner was incompetent at the time of trial and was suffering from a mental disturbance

which would, at the least, have allowed the sentencing court to find the "diminished capacity" mitigating factors set out in Section 921.141(6)(f), Florida Statutes. Most telling, trial counsel himself made the statement that Mr. Adams could not remember crucial details about the crime and therefore could not aid in his defense. See Speedy v. Wyrick, 702 F.2d 723, 726-727 (8th Cir. 1983)(Despite testimony of two psychiatrists that at the time of their examination Defendant was competent to stand trial and because of events occurring closer to and during trial, the trial attorney should have been aware of Defendant's incompetency and was apparently unaware of the legal possibility of a competency hearing; accordingly, the case was remanded to district court for evidentiary hearing to resolve factual issues); Beavers v. Balkcom, 636 F.2d 114 (5th Cir. 1981) (Even though trial counsel explored insanity defense and presented some evidence of his sanity at trial, factual questions needed to be answered concerning what further investigation would have shown and what professional help would have added to his defense.)

In summary, Petitioner has shown that (1) there was an inadequate state court hearing on ineffectiveness of counsel; (2) there are facts in dispute as to Petitioner's mental state at the time of the crime and the time of trial and what investigation was done by trial counsel into Petitioner's mental state, both as it related to his competency to stand trial and as to the development of additional mitigating factors, and the results of that investigation; and (3) if the allegations of fact made during Petitioner's post-conviction proceedings are proved, Petitioner will be entitled to relief under the standard set out in Strickland. The Circuit Court's decision denying a hearing conflicts with Townsend, and certiorari review is appropriate.

CONCLUSION

The right of life should be closely guarded and jealously protected by our judicial system. Capital punishment stands apart from other forms of criminal punishment because it deprives

the defendant of this precious right to life and because this deprivation is final and irrevocable. Consequently, any proceeding that concludes with the imposition of the death penalty must be scrutinized carefully. This was an especially close case. The mitigating and aggravating factors, according to the state trial court, were equally divided three to three. Dissents in the state court appellate opinions noted that some of the aggravating factors were highly questionable. In light of this, and in light of the numerous errors pointed out herein, this Court should issue a writ of certiorari to review the decision of the United States Circuit Court for the Eleventh Circuit.

DATED this 11th day of November, 1985.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Petition and accompanying Appendices have been furnished by U.S. Mail to Ms. Margene Roper, Assistant Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, FL 32014, and that the original and nine copies of the foregoing Petition and accompanying Appendices have been furnished by Federal Express to the Clerk of the United States Supreme Court, Washington, D.C. 20543, this 11th day of November, 1985.

Kenneth R. Hart
ATTORNEY

EDITOR'S NOTE

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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No._____

AUBREY DENNIS ADAMS, Petitioner,

v.

LOUIS L. WAINWRIGHT
and JIM SMITH, Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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AUBREY DENNIS ADAMS

2364

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No._____

AUBREY DENNIS ADAMS, Petitioner,

v.

LOUIS L. WAINWRIGHT
and **JIM SMITH**, Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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APPENDIX

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to furnish evidence merely tending to prove guilt, nor to prove a mere probability of guilt, et cetera, and it's that page and the next page, which is the one that ends by saying: In other words, you have no right to go outside the evidence for doubts of any kind; however, a lack of evidence or an insufficiency of evidence may create a reasonable doubt. That instruction is given at the request of the Defense and is being concurred -- and the State is agreeing that that instruction can be given in lieu of the standard Jury instruction under the Second Edition. Is that correct, Mr. Black?

MR. BLACK: Yes, sir.

THE COURT: Mr. Gill?

MR. GILL: Yes, Your Honor.

(Thereupon the following proceedings were held within the hearing of the spectators and other present in the Courtroom):

THE COURT: All right; if you will bring the Jury in, please, Mr. Bailiff.

(Thereupon the Bailiff escorted the members of the Jury into the Courtroom at 11:35 A. M., after which the following proceedings were held in the presence of the members of the Jury):

THE COURT: Ladies and gentlemen of the Jury,

you have listened carefully to the evidence and the argument of Counsel. I now ask of you the same careful attention to the law, as determined by the Court, which you must apply to the facts as you find them from the evidence.

You alone, as Jurors sworn to try this cause, must pass on the issues of fact, and your verdict must be based solely on the evidence or the lack of evidence and the law as it is given to you by the Court.

The Defendant, Aubrey Dennis Adams, Jr., is charged with the crime of first degree murder in that on January the 23rd, 1978, in Marion County, Florida, he did unlawfully, from a premeditated design to effect the death of Trisa Gail Thornley, or any human being, did kill and murder Trisa Gail Thornley, a human being, by strangling the said Trisa Gail Thornley, in violation of Florida Statute 782.04.

The charge of premeditated murder includes the lesser charges of: One, second degree murder; two, third degree murder; and, three, manslaughter.

The Defendant has entered his plea of not guilty. The effect of this plea is to require the State to prove each material allegation of the

Indictment beyond and to the exclusion of every reasonable doubt before the Defendant may be found guilty.

The killing of one human being by another is called homicide. Every homicide falls within one of these four classes: One, justifiable homicide; two, excusable homicide; three, murder in the first, second or third degree; and, four, manslaughter.

The circumstances of each case determine whether a homicide is justifiable, excusable, murder or manslaughter.

Justifiable homicide and excusable homicide are lawful. Murder and manslaughter are unlawful and constitute violations of the criminal laws.

The essential elements of an unlawful homicide, together with other matters that must be proved beyond and to the exclusion of every reasonable doubt before there can be a conviction in this case, are as follows: One, Trisa Gail Thornley is, in fact, dead; two, such death was caused by the criminal act or agency of another; and, three, the death was caused by the Defendant, Aubrey Dennis Adams, Jr.

These four classes of homicide must now be defined to you so that you can properly understand

them.

The first class that I made reference to: The killing of a human being is justifiable homicide and lawful when committed by any person in the use of such force as he reasonably believes is necessary to prevent imminent death or great bodily harm to himself or another.

The second class: Excusable homicide is homicide which is committed by accident and misfortune in doing any lawful act by lawful means with usual, ordinary caution and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

Homicide is excusable and lawful if it is committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner, but if such killing is done by the use of a dangerous weapon or in a cruel or unusual manner, it is manslaughter.

A sudden and sufficient provocation is something

which would naturally and instantly produce in the mind of an ordinary person the highest degree of anger, rage, resentment or exasperation.

The heat of passion is anger, rage, resentment or exasperation so intent -- so intense as to overcome or suspend the use of ordinary judgment and to render the mind of an ordinary person incapable of calm reflection.

A dangerous weapon is any weapon which, taking into account the manner in which it is used, is likely to produce death or great bodily harm.

The third class: Murder in the first degree, is the unlawful killing of a human being when perpetrated from a premediated design to effect the death of the person killed or any human being.

A premeditated design to kill is a fully-formed conscious purpose to take human life, formed upon reflection and present in the mind at the time of the killing. The law does not fix the exact time which must pass between the formation of the intent to kill and the carrying out of that intent. It may be only a short time and yet make the killing premeditated, if the fixed intent to kill was formed long enough before the actual killing to permit some reflection on the part of

the person forming it, and that person was at the time of carrying out that intent fully conscious of a settled and fixed purpose to kill and of the results which would follow such killing. When such state of mind exists, there is a premeditated design to kill, although the killing follows closely upon the formation of the intent.

The question of premeditated design is a question of fact to be determined by the Jury from the evidence, like every other material fact in this case. The law does not require that a premeditated design be proved only by direct and positive testimony. The existence of a premeditated design, as well as its formation, are operations of the mind, as to which direct and positive testimony cannot always be obtained. Therefore, the law recognizes that it may be proved by circumstantial evidence. It will be sufficient proof of such premeditated design if the circumstances attending the homicide and the conduct of the accused convince you beyond a reasonable doubt of the existence of such premeditated design at the time of the homicide.

If a person has a premeditated design to kill one person and in attempting to kill that person

actually kills another whom he did not intend to kill, he is nonetheless guilty of murder in the first degree.

The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree, even though there is no premediated design or intent to kill.

If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime, the killing is in the perpetration of or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

The punishment provided by law for murder in the first degree is life imprisonment or death, as may be determined by the Court at a later proceeding.

Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a

depraved mind, regardless of human life, although without a premeditated design to effect the death of any particular individual.

An act is one imminently dangerous to another and evincing a depraved mind, regardless of human life, if it is an act, or a series of acts, which do the following: One, a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another; two, is done from ill-will, hatred, spite or an evil intent; and, three, is of such a nature that the act itself indicated an indifference to human life.

The punishment provided by law for murder in the second degree is imprisonment in the State Prison for life, or for such term of years as may be determined by the Court.

Murder in the third degree is the unlawful killing of a human being when perpetrated without any design to effect death by a person engaged in the commission of any felony other than arson, rape, robbery, burglary, the abominable and detestable crime against nature or kidnapping.

A felony is a crime punishable by death or imprisonment in the State Penitentiary.

A person is engaged in the commission of a

felony when doing an act which is a part of the felony, or necessary to the completion of the course of action constituting the felony, or while escaping from the immediate scene of the felony.

The punishment provided by law for murder in the third degree is imprisonment in the State Prison for a term of years to be fixed by the Court, but not exceeding fifteen years.

Fourth class: Manslaughter is the killing of a human being by the act, procurement or culpable negligence of another, without lawful justification, in cases where such killing shall not be justifiable or excusable homicide or murder.

Culpable negligence is negligence of a gross and flagrant manner, and consists of more than a mere failure to use ordinary care. Culpable negligence is consciously doing an act or following a course of conduct which any reasonable person would know would likely result in death or great bodily injury to some other person, even though done without the intent to injure any person but with utter disregard for the safety or -- of another.

The punishment provided by law for manslaughter is imprisonment in the State Prison for not more than fifteen years.

To summarize: The essential elements of an unlawful homicide which must be proved beyond a reasonable doubt in this case before there can be a conviction of any offense are as follows: One, that Trisa Gail Thornley is, in fact, dead; two, that the killing was wrongful and by the means stated in the Indictment; three, that Trisa Gail Thornley was killed by the Defendant; and, four, that the killing was neither justifiable or excusable homicide.

If the elements are established, then it will be necessary for you to determine the degree of the unlawful homicide.

If the Defendant, in killing the deceased, acted from a premeditated design to effect the death of the deceased, or some other human being, he should be found guilty of murder in the first degree.

If the killing was not from a premeditated design to effect the death of any human being, but was in the perpetration of an act imminently dangerous to another, evincing a depraved mind, regardless of human life, the Defendant should be found guilty of murder in the second degree.

If the killing took place while the Defendant

was engaged in the commission of a felony other than arson, rape, robbery, burglary, the abominable and detestable crime against nature or kidnapping, the Defendant should be found guilty of murder in the third degree.

If the killing was by the act, procurement or culpable negligence of the Defendant and was not murder in any degree or justifiable or excusable homicide, the Defendant should be found guilty of manslaughter.

Of course, if any one of the essential elements of any unlawful homicide has not been proved beyond a reasonable doubt, the Defendant should be found not guilty.

If you find the Defendant guilty of murder in the first degree, then at a later proceeding you will render an advisory sentence to the Court recommending that the Defendant be sentenced to life or death. The Court may accept such recommendation and sentence the Defendant as recommended, or it may, under certain circumstances, reject such recommendation and sentence the Defendant to either life or death.

Ordinarily, it is not necessary for the State to prove that a crime was committed on the date

alleged in the Indictment, but in this case, by a separate pleading, the exact date has been made an issue to be tried. The burden, therefore, rests upon the State to prove byond a reasonable doubt that the crime was committed between January the 23rd, 1978, and January the 24th, 1978.

Proof that the crime was committed in Marion County need be only with reasonable certainty. It need not be proved beyond a reasonable doubt.

The Defendant in every criminal case is presumed to be innocent until his guilt is established by the evidence to the exclusion of and beyond every reasonable doubt.

Before the presumption of innocence leaves the Defendant, every material allegation of the Indictment must be proved by the evidence to the exclusion of and beyond every reasonable doubt. This presumption accompanies and abides with the Defendant as to each and every material allegation of the Indictment, through each stage of the trial, until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

If any of the material allegations of the Indictment is not proved to the exclusion of and beyond every reasonable doubt, you must give the

Defendant the benefit of the doubt and find him not guilty, but if you find from the evidence that all the material allegations of the charge have been proved beyond and to the exclusion of every reasonable doubt, then you must find the Defendant guilty.

To overcome the presumption of innocence of the Defendant and establish his guilt, it is not sufficient to furnish evidence merely tending to prove guilt, not to prove a mere probability of guilt, but proof of guilt to the exclusion of and beyond every reasonable doubt is absolutely necessary.

You must carefully, impartially and conscientiously consider, compare and weigh all the evidence, and if after doing this you think that your understanding, judgment and reason are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the charge has been proved to the exclusion of and beyond a reasonable doubt, it is your duty to find the Defendant guilty.

A doubt which is a mere possible doubt, a speculative, imaginary or forced doubt, is not a reasonable doubt and, for the reason that everything

relating to human affairs is open to some doubt of this kind, such a doubt must not influence the Jury to return a verdict of not guilty where there has been an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt or, if, having a conviction it is one which is not stable but one which waivers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the Defendant not guilty because the doubt is reasonable.

It is to the evidence introduced upon this trial, and to it alone, that you are to look for such proof.

A doubt which is not suggested by, or does not arise from, the evidence or the lack of evidence is not a reasonable doubt and should never be considered. In other words, you have no right to go outside the evidence for doubts of any kind; however, a lack of evidence or an insufficiency of evidence may create a reasonable doubt.

You are the sole judges of the weight and sufficiency of the evidence and of the credibility of the witnesses.

You should reconcile any conflicts you find in the evidence without imputing untruthfulness to any witness. If you cannot reconcile any conflicts you find, then it is your duty to reject the evidence you find to be unworthy of belief and to accept and rely upon the evidence you find worthy of belief.

In determining the believability of any witness and the weight to be given his testimony, you may properly consider the demeanor of the witness while testifying, his frankness or lack of frankness, his intelligence, his interest, if any, in the outcome of the case, the means and opportunity he had to know the facts about which he testified, his ability to remember the matters about which he testified, and the reasonableness of his testimony, considered in the light of all the evidence in the case.

From these and all of the facts and circumstances in the evidence, you must reach your own independent conclusions and in so doing you should use the same common sense, sound judgment and reason you use in everyday life.

An expert witness is one who, by education, training or experience, has become expert in any

art, science, profession, business or calling. An expert witness is permitted to give his opinion as to matters in which he is an expert, and may also state the reasons for his opinion.

You should consider each expert opinion received in evidence and give it the weight you think it deserves, and you may reject it entirely if you find that the alleged facts upon which it is based have not been proved or that the reasons given in support of the opinion are not sound.

If it is proved that a witness at some time prior to this trial made a statement inconsistent with his present testimony, you should take into consideration such statement and the time and place at which, and conditions under which, it was made in weighing his present testimony and give such weight to his present testimony as you feel it is entitled to receive in the light of all the evidence in the case.

In every criminal proceeding, a Defendant has the absolute right to remain silent. That no time is it the duty of a Defendant to prove his innocence. From the exercise of a Defendant's right to remain silent, a Jury is not permitted to draw any inference of guilt, and a Defendant's failure to take

the stand must not be considered in any manner an admission of guilt, nor should his failure to take the witness stand influence your verdict in any manner whatsoever.

A confession voluntarily made should be given fair and unprejudiced consideration with due regard to the time and circumstances under which it was made, its harmony or inconsistency with other evidence, as well as the motives shown by the evidence to have influenced the making of the confession. You may believe any part of such a confession which you find to be true and reject those parts which you find to be untrue.

Circumstantial evidence is legal evidence and a crime may be proved by such evidence. A well-connected chain of circumstances is as conclusive in proving a crime as is positive evidence. Its value is dependent upon its conclusive nature and tendency.

Circumstantial evidence is governed by the following rules: One, the circumstances themselves must be proved beyond a reasonable doubt; two, the circumstances must be consistent with guilt and inconsistent with innocence; three, the circumstances must be of such a conclusive nature and

tendency that you are convinced beyond a reasonable doubt of the Defendant's guilt.

If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence.

Circumstances which, standing alone, are insufficient to prove or disprove any fact may be considered by you in weighing direct and positive testimony.

You are to disregard the consequences of your verdict. You are empanelled and sworn only to find a verdict based upon the law and the evidence. You are to consider only the testimony which you have heard,along with the other evidence which has been received, and the law as given to you by this Court.

You are to lay aside any personal feelings you may have in favor of or against the State and in favor of or against the Defendant. It is only human to have personal feelings or sympathy in matters of this kind, but any such personal feelings or sympathy has no place in the consideration of your verdict.

When you have determined the guilt or innocence of the accused, you have completely fulfilled

your solemn obligation under your oaths.

Your verdict finding the Defendant either guilty or not guilty must be unanimous. The verdict must be the verdict of each Juror, as well as the Jury as a whole.

The Indictment charges the crime of first degree murder which includes, as a matter of law, the lesser included crimes of: One, second degree murder; two, third degree murder; and, three, manslaughter.

You may find the Defendant guilty as charged in the Indictment or guilty of such lesser included crimes as the evidence may justify. You may return one of these verdicts: One, not guilty; two, guilty of first degree murder as charged in the Indictment; three, guilty of second degree murder; four, guilty of third degree murder; or, five, guilty of manslaughter.

If you return a verdict of guilty, it should be for the highest offense which has been proved beyond a reasonable doubt. If you find that no offense has been proved beyond a reasonable doubt, then, of course, your verdict must be not guilty.

You are here only to determine the guilt or innocence of the Defendant. So if the evidence

convinces you beyond every reasonable doubt of the guilt of the Defendant, you should find him guilty, even though you may believe one or more other persons are also guilty.

The Defendant is not on trial for any act or conduct not charged in this Indictment, and you must consider the evidence only as it relates to this charge.

Nothing I have said in these instructions, or at any other time during the trial, is any intimation whatever as to what verdict I think you should find. The verdict is the sole and exclusive duty and solemn responsibility of you, the Jury, and neither the Court nor anyone else can help you in performing that duty.

If, after having heard all the evidence and the law as given you by the Court, you have any reasonable doubt as to the Defendant's guilt, you must find him not guilty. However, if you are satisfied beyond every reasonable doubt of his guilt, it is your duty to find him guilty of such crime as to which you are satisfied of his guilt beyond every reasonable doubt.

If, while you are deliberating, you wish to examine more closely the Exhibits which have been

admitted into evidence, you may call for them and they will be delivered to you, or viewed here in the Courtroom.

Your first duty upon retiring will be the election of a foreman or forewoman to preside over your deliberations and sign your verdict -- your verdict when you have arrived at one.

If you wish to communicate with the Court during your deliberations, please notify your Bailiff.

Let me add one other thing other than these general instructions. If you have a question that comes up that you feel must be answered by the Court, please do not ask that question of the Bailiff. He cannot answer that for you and if he should it would become reversible error. I'm going to give you a yellow pad -- Mr. Black or Mr. Gill, you have no objection to an unmarked yellow pad of any kind so that the question can be written on that?

MR. BLACK: No, sir.

MR. GILL: No, sir.

THE COURT: All right. I will have the Bailiff at the time he gives you the proposed form of the verdicts to give you this yellow

pad. If you have a question that must be answered by the Court, please write the question on this yellow pad. You will then give that question to the Bailiff. Mr. Bailiff, you are instructed to bring the question directly to me, and at that point I will notify both sets of attorneys that I have received a question. I'll ask that you come to my chambers. I'll ask the Court Reporter to come there, and we will discuss the question and decide in what manner it will be answered. Once having reached that decision, the Jury will be brought back into the Courtroom, the question read into the record and the answer given that has previously been decided upon by the Court.

Would Counsel please approach the bench. Mr. Brandies?

(Thereupon Counsel for the respective parties to the cause approached the bench and the following proceedings were held out of the hearing of the members of the Jury):

MR. GILL: Judge, I'll point out one thing. It says Inverness, Citrus County. You may want to --

THE COURT: Has the Court omitted any instruction that the Court advised Counsel in the

instruction conference that it would give in this cause?

MR. GILL: No, sir, Your Honor.

MR. BLACK: No, sir.

THE COURT: Are there any objections to the instructions as given by the Court?

MR. GILL: No, sir, Your Honor.

MR. BLACK: No, sir.

THE COURT: Okay; that will be all.

MR. GILL: One other thing, Judge. The alternate Jurors, will we keep them --

THE COURT: What I'm intending to do, I've talked with the head Bailiff of Lake County, George. I don't know what his last name is. As soon as the twelve, that is the Jury -- I will ask the two alternates to stay here. The twelve will be taken into their Jury Room. There is another Jury Room and my Bailiff has been shown where they are. He will take those two alternates into that room so that they are not in the regular Jury but where they will be isolated, and both sets of Jurors will be fed, and then I would intend to bring the alternates back at the time if and when a verdict is reached or if at any time the Jury comes back into the Courtroom those alternates

will be back in the Courtroom.

MR. BLACK: Very good.

THE COURT: I think the record should show that the Defense agree and the State has agreed to that procedure.

MR. GILL: And the State would request a copy of the Indictment go in with the evidence.

MR. BLACK: That's proper.

THE COURT: All right; do you have a copy of the original?

MR. GILL: Yes, sir.

MR. BLACK: Wait a minute; let me see the copy.

(Thereupon Mr. Black examined the instrument).

MR. BLACK: This has pencil marks on it. Can Mrs. Hoppe make a photostatic copy of the Court's original, Judge?

THE COURT: Here is the Court's original. Look at that and see if there's anything you object to.

(Thereupon Mr. Black examined the instrument).

THE COURT: How about let's just send the original in?

MR. BLACK: That will be fine.

MR. GILL: Fine.

THE COURT: Miss Clerk, if you will remove that, please.

(Thereupon the following proceedings were held within the hearing of the members of the Jury):

THE COURT: Now, with the exception of our alternates, you may retire to consider the verdict. For record purposes, and so that all of you can remember, Mrs. White, you're alternate number one and you should remain here, please, and Mr. Eldridge, you're alternate number two. You should remain here, please. Mr. Bailiff, if you will give the proposed verdict forms to the Jury, the original Indictment and the pad that's been agreed upon, which is a blank pad, and take them back into their deliberation Jury Room, please. Mr. Bailiff, after you get them seated in their room, come back into the Courtroom so I can have you do something else, please.

(Thereupon the Bailiff escorted the twelve Jurors into the Jury Room at 12:04 P. M., after which the following proceedings were held in the absence of the twelve Jurors):

THE COURT: While we're waiting on the Bailiff to come back, let the record show that the original twelve Jurors are outside the hearing of this

THE COURT: But you did argue --

MR. BLACK: -- just what you said you --

THE COURT: -- at least it was kidnapping.

MR. OLDHAM: Okay.

THE COURT: You don't object?

MR. OLDHAM: No.

THE COURT: I'm going to give Defendant's Number Nine and Defendant's Number Five, one right after the other. Where I had previously told you I was going to give Nine, I'm adding Five to it.

(Thereupon the following proceedings were held within the hearing of the members of the audience):

THE COURT: Anything further we need to take care of before I bring the Jury back in, Mr. Oldham?

MR. OLDHAM: No, Your Honor.

THE COURT: Mr. Black?

MR. BLACK: No, sir.

THE COURT: All right. Bring the Jury back in.

(Thereupon the Bailiff returned the members of the Jury to the Courtroom at 4:22 P. M., after which the following proceedings were held in the presence of the members of the Jury):

THE COURT: Ladies and gentlemen of the Jury,

it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of first degree murder. As you have been told, the final decision as to what punishment should be imposed is the responsibility of the Judge. However, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your verdict should be based upon the evidence which has been presented to you in these proceedings.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence: (A), that the crime for which the Defendant is to be sentenced was committed while the Defendant was under sentence of imprisonment; (B), that at the time of the crime for which he is to be sentenced, the Defendant had been previously convicted of another

capital offense or of a felony involving the use or threat of violence to some person; (C), that the Defendant, in committing the crime for which he is to sentenced, knowingly created a great risk of death to many persons; (D), that the crime for which the Defendant is being sentenced was committed while the Defendant was engaged in the commission of an attempt to commit or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb; (E), that the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (F), that the crime for which the Defendant is to be sentenced was committed for pecuniary gain; (G), that the crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any Governmental function or the enforcement of laws; (H), that the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel.

Heinous means extremely wicked or shockingly

evil.

Atrocious means outrageously wicked and vile.

Cruel means designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others; pitiless.

In considering these aggravating circumstances, you must not consider any physical change in the body of the victim after death.

Where two or more aggravating circumstances refer to the same aspect of the crime, you shall consider them as constituting only one aggravating circumstance.

If you do not find that there existed sufficient of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence to life imprisonment.

Should you find sufficient number of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these: (A), that the Defendant has no significant history

of prior criminal activities; (B), that the crime for which the Defendant is to be sentenced was committed while the Defendant was under the influence of extreme mental or emotional disturbance; (C), that the victim was a participant in the Defendant's conduct or consented to the act; (D), that the Defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the Defendant's participation was relatively minor; (E), that the Defendant acted under extreme duress or under the substantial domination of another person; (F), the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (G), age of the Defendant at the time of the crime.

The aggravating circumstances which you may consider are limited to those upon which I've just instructed you. However, there is no such limitation upon the mitigating factors which you may consider.

Aggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision.

Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding, judgment and reason of the Jury are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstance has been proved to the exclusion of and beyond a reasonable doubt.

Evidence tending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the exitence of such circumstance at the time of the offense should be wholly disregarded.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law given to you by this Court. Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances

found to exist.

In determining whether to recommend life imprisonment or death, the procedure you are to follow is not a mere counting process of "x" number of aggravating circumstances and "y" number of mitigating circumstances, but rather you are to exercise a reasoned judgment as to what factual situations require the imposition of death and which situations can be satisfied by life imprisonment in light of the totality of the circumstances present.

Based on these considerations, you should advise the Court whether the Defendant should be sentenced to life imprisonment or to death.

In these proceedings, it is not necessary that the verdict of the Jury be unanimous but a verdict may be rendered upon the finding of a majority of the Jury.

The fact that the determination of whether or not a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider

the evidence, and all of it, realizing that human life is at stake, and bring to your bear your best judgment upon the sole issue which is submitted to you at this time: Whether a majority of your number recommend that the Defendant be sentenced to death or to life imprisonment.

Should a majority of the Jury determine that the Defendant should be sentenced to death, you should recommend an advisory sentence as follows: "A majority of the Jury advise and recommend to the Court that it impose the death penalty upon the Defendant, Aubrey Dennis Adams, Jr."

On the other hand, if, after considering all the law and the evidence touching upon the issue of punishment, a majority of the Jury determine that the Defendant should not be sentenced to death, then you should render an advisory sentence as follows: "A majority of the Jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the Defendant, Aubrey Dennis Adams, Jr."

The law requires that seven or more members of the Jury agree upon any recommendation advising either the death penalty or life imprisonment. You will now retire to consider your recommendation,

and when seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned into Court.

Who are the two alternates? Is it Mrs. White and Mr. Eldridge? So that there is no disagreement, the two alternates are Mr. Eldridge and Mrs. White. Both the State and Defense agree to that?

MR. OLDHAM: Yes, Your Honor.

MR. BLACK: Yes, sir.

THE COURT: All right. Except for Mr. Eldridge and Mrs. White, when the Bailiff hands you these verdicts y'all may go back into the Jury Room. The two alternate Jurors are to remain here. You may take the Jury back.

(Thereupon the Bailiff escorted the twelve members of the Jury into the Jury Room at 4:31 P.M., after which the following proceedings were held in the presence of the two alternate Jurors):

THE COURT: All right. Mr. Eldridge and Mrs. White, you are dismissed from your subpoena and will not have to sit further. I again want to thank you. Yours has been a very trying job. I realize and I hope you do as to the importance that you have played in this case. Had we needed

have -- do you care to be heard?

THE DEFENDANT: No, sir.

THE COURT: This cause coming on to be considered pursuant to the provisions of Section 921.141, Florida Statutes, after (A), the conviction of the Defendant, Aubrey Dennis Adams, Jr., of murder in the first degree, by a duly impanelled Jury and, (B), the rendition by such Jury at the conclusion of the sentencing proceeding of an advisory sentence recommending the imposition of the death sentence, and after carefully considering and weighing the evidence presented during such trial and sentencing proceeding, the arguments of the attorneys as to the sentence to be imposed, and the presentence investigation report submitted by the Florida Parole Commission, the undersigned concludes and determines:

One, That the State proved beyond and to the exclusion of a reasonable doubt the following aggravating circumstances, to-wit:

(a) The capital felony was committed while the Defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping,

aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb,

(b) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody,

(c) The capital felony was especially heinous, atrocious or cruel,

And the State failed to prove beyond and to the exclusion of a reasonable doubt the following aggravating circumstances, to-wit:

(a) The capital felony was committed by a person under sentence of imprisonment,

(b) The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person,

(c) The Defendant knowingly created a great risk of death to many persons,

(d) The capital felony was committed for pecuniary gain,

(e) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

That the Defendant, Aubrey Dennis Adams, Jr., established the following mitigating circumstances,

to-wit:

(a) The Defendant has no significant history of prior criminal activity,

(b) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance,

(c) The age of the Defendant at the time of the crime,

And that the Defendant failed to establish by evidence any other mitigating circumstances, including, but not limited to 921.141(7), c, d, e, f, Florida Statutes.

FURTHER FINDINGS OF FACT: That the capital felony was committed while the Defendant was engaged in or attempting to engage in or in the flight after committing kidnapping is proven beyond and to the exclusion of a reasonable doubt by Defendant Adams' admission, State's Exhibit Number 49, in which he says: After getting off from work as a prison guard at Lowell Prison, he went to check his mail at his old residence, which is approximately two blocks from the residence of the victim, Trisa Gail Thornley, age eight, and saw her walking home from school about one and a half blocks from her home. He knew the

victim and offered to give her a ride home. She got into Defendant's car and he started towards her home, then turned away towards the Pine Street Shopping Center; then out State Road 200 towards the Central Florida Community College. He remembered being stopped somewhere when she started screaming and he put his hand over her mouth and she stopped breathing.

The above fact of kidnapping is also supported by the testimony at the trial of the Defendant by police officers S. H. Stephenson, John E. Fluno and W. R. Fugitt regarding the written statements made by the Defendant and the oral statements concerning her death and her disappearance that he gave the three officers.

Kidnapping is also evidenced by the testimony of Trisa Gail Thornley's third grade school teacher, Carolyn Andrews, who observed the victim leave school at approximately 2:20 P. M. on January 23, 1978, and by Trisa Gail Thornley's aunt and uncle, Lawson and Theresa Hopper, and the victim's sister, Tracy Thornley, who stated that the victim, Trisa Gail Thornley, did not return home from school that day as she usually did.

For additional support that 921.141(6) (d),

Florida Statutes, is proved beyond and to the exclusion of a reasonable doubt is the evidence proving that the capital felony was committed while the Defendant was engaged in or attempting to engage in or flight after committing rape is proven beyond and to the exclusion of a reasonable doubt by the testimony of Officer Stephenson who was present at the Defendant's interview, who stated that Defendant Adams said that he thought he tried to but couldn't do it, or couldn't bring himself to do it, and that her body was found nude with her hands taped behind her back, such tape applied to the victim, by sworn testimony of pathologist, Dr. Gertrude Warner, of Ocala, Florida, as being applied around the wrists while the victim, Trisa Gail Thornley, was still alive.

That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody is proven beyond and to the exclusion of a reasonable doubt by the facts stated above proving kidnapping and rape by the additional fact that Trisa Gail Thornley was found dead on March 15th, 1978, which prevented any testimony on her part concerning kidnapping and rape some seven weeks after her

disappearance while walking home from school.

That the capital felony was especially heinous, atrocious or cruel is proven beyond and to the exclusion of a reasonable doubt by expert medical testimony that the autopsy, performed by Drs. Gertrude Warner and William Shutze, showed a bruise on one arm, inflicted prior to death, that the autopsy showed swelling in the hands induced by tight binding with tape prior to death, State's Exhibit Number 17, that the autopsy showed that the body was a nude body of an eight year old girl whose hands were tightly taped behind her back prior to death, which showed that Trisa Gail Thornley had time to anticipate her murder and that the autopsy and photographs showed seven coils of rope with a circumference of nine and three-fourths inches around the neck of Trisa Gail Thornley, as shown in evidence by State's Exhibit Number 16, and that the child's body was placed in a plastic garbage bag and thrown in a wooded area some three miles from her home.

Based exclusively and only upon, (1), the records and the evidence properly introduced and admitted during the trial, sentencing proceedings and presentence investigation and, (2), the

sufficient aggravating circumstances set forth above and finding that three mitigating circumstances, the fact that the Defendant was only twenty years of age at the time of the crime and that the Defendant was under the influence of extreme mental or emotional disturbance, in that the Defendant and his wife were getting a divorce and, (3), that the Defendant had no significant prior criminal activity are insufficient to outweigh the aggravating circumstances, the undersigned accepts and agrees with the advisory sentence by the Jury recommending that the death sentence should be imposed on the Defendant, Aubrey Dennis Adams, Jr.

The Defendant, Aubrey Dennis Adams, Jr., being personally before this Court, represented by his Counsel, Reginald Black and Frederick Landt, his attorneys of record, heretofore entered his plea of not guilty to the charge of muder in the first degree as defined by Section 782.04, as amended, of the Florida Statutes, and thereupon said Defendant was duly tried by a Jury, with his attorneys representing him at such trial, and the Jury having brought in its verdict finding the Defendant, Aubrey Dennis Adams, Jr., guilty

of murder in the first degree, and the Court having inquired and given the Defendant an opportunity to be heard and show cause why he sould not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence, and no cause being shown, it is thereupon ORDERED AND ADJUDGED that the Defendant, Aubrey Dennis Adams, Jr., is hereby adjudicated guilty of the crime of murder in the first degree, 782.04, as amended, of the Florida Statutes, and the Jury rendered its advisory sentence that the Defendant receive the death sentence, and the Court having adjudicated said Defendant guilty of said offense and filed its finding of fact herein, and the Defendant being asked by the Court whether he had anything to say why sentence of the law should not now be pronounced upon him, and saying nothing to preclude such sentence, it is therefore,

The judgment, order and sentence of the Court that the Defendant, Aubrey Dennis Adams, Jr., for the crime in which he has been convicted of, to-wit: Murder in the first degree, be electrocuted till he be dead in the manner as described and directed by the laws of the State of Florida.

It is further ordered that the Defendant, Aubrey Dennis Adams, Jr., be committed to the custody of the Department of Offender Rehabilitation and be imprisoned until he be electrocuted till he be dead in the manner directed by the laws of the State of Florida.

It is further ordered that the Sheriff of Marion County is hereby ordered and directed to deliver said Defendant, Aubrey Dennis Adams, Jr., to the Department of Offender Rehabilitation together with a copy of this judgment and sentence.

It is further ordered and directed that the Defendant, Aubrey Dennis Adams, Jr., shall pay the sum of one dollar pursuant to Section 943.25, Florida Statutes.

Mr. Adams, you are hereby advised that you have the right to appeal the judgment and sentence of this Court if you so desire. You have thirty days from this date within which to file your Notice of Appeal, that if you fail to do so your right to appeal has been waived. You are further advised that you have the right to have an attorney represent you in prosecuting said appeal and that if you cannot afford one the Court will appoint one for you at no expense to you upon your request.

The Defendant in open Court was advised of his right to appeal from this judgment and sentence within thirty days from this date, and the Defendant's entitlement of the assistance of Counsel in taking said appeal upon a showing that said Defendant was entitled to an attorney at the expense of the State.

Done and ordered in open Court in Ocala, Marion County, Florida, this the 16th day of January, 1979.

Fingerprint the Defendant.

(Thereupon the Defendant, Aubrey Dennis Adams, Jr., submitted himself for the taking of fingerprints, after which time the Bailiff escorted the Defendant from the Courtroom at 1:55 P. M., after which the following proceedings were held):

THE COURT: Mr. Black, I believe there are two other Motions that we need to dispose of.

MR. BLACK: Yes, sir, Judge. Actually, there's one Motion containing two subject matters. The Court previously, as you see in the record, declared Mr. Adams to be indigent for purposes of investigative costs and witness subpoenas and that sort of thing. I'd like to file now with

Aubrey Dennis ADAMS, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 56134.

Supreme Court of Florida.

Feb. 11, 1982.

Rehearing Denied May 5, 1982.

The Circuit Court, Marion County, W. F. Edwards, J., convicted defendant of murder in the first degree, and defendant appealed. The Supreme Court, Adkins, J., held that: (1) although erroneous or uninvited felony-murder instruction was given, evidence of premeditation was sufficient to render error harmless, (2) trial court did not err in admitting into evidence color photograph taken at scene where body was discovered and other photograph of body showing victim's hands taped together with adhesive tape; and (3) sentence of death was appropriate.

Affirmed.

Boyd, J., concurred in part and dissented in part with an opinion.

McDonald, J., concurred as to the conviction and dissented as to the sentence.

1. Homicide ⇐18(1)

Where indictment alleged that defendant murdered victim, unlawfully from premeditated design by strangling, State could prosecute under both theory of premeditation and theory of felony-murder.

2. Homicide ⇐236(1)

Evidence was sufficient to sustain finding that death was caused by strangulation, not by defendant placing his hand over mouth of victim so as to keep her from screaming or yelling.

3. Homicide ⇐340(1)

Although erroneous or uninvited felony-murder instruction was given, evidence of premeditation was sufficient to render erroneous instruction harmless, and thus reversal of conviction of murder in the first degree was not warranted.

4. Criminal Law ⇐1038.2, 1038.3

Request for an instruction or an objection over a failure to give an instruction is a prerequisite to raising an alleged error on appeal.

5. Criminal Law ⇐438(7)

If photograph is relevant to issue required to be proven in a case, fact that evidence is gruesome and offensive does not bar admissibility.

6. Criminal Law ⇐438(6)

In murder prosecution, color photograph taken at scene where body was discovered was relevant to show crime scene and premeditation and was admissible.

7. Criminal Law ⇐438(6)

Photograph, apparently taken somewhere other than at scene where victim's body was discovered, showing tying of hands and tape on victim's hands, was relevant to show premeditation and circumstances of death and was admissible.

8. Homicide ⇐354

Imposition of death sentence upon conviction of first-degree murder of eight-year-old girl, was proper, in view of evidence that capital felony was committed while defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit a rape or kidnapping, and in view of evidence indicating that killing was heinous, atrocious, and cruel. West's F.S.A. § 921.141(5)(d).

9. Homicide ⇐235

In sentencing phase of first-degree murder trial, there was sufficient competent evidence from which judge could properly have found that capital felony was committed while defendant was engaged in the commission of, or in attempt to commit, or flight after committing or attempting to commit, a rape or kidnapping. West's F.S.A. § 921.141(5)(d).

10. Homicide ⇐354

Trial judge did not err in finding that defendant's acts constituted an aggravating factor for purposes of determining whether to impose death sentence, despite contention that there was no crime of rape in Florida since rape statute was repealed and nomenclature of offense was changed to "sexual battery" or "attempt to commit sexual battery." West's F.S.A. §§ 794.011, 921.141(5)(d).

11. Constitutional Law ⇐258(1)

Due process requires only that law give sufficient notice so that men may conform their conduct so as to avoid that which is forbidden. U.S.C.A.Const.Amend. 14.

12. Homicide ⇐354

There was sufficient competent evidence from which judge could have found that defendant committed capital felony in an effort to avoid or prevent a lawful arrest, in view of evidence that victim knew and could have identified defendant, that he encased body in white plastic garbage bags and tied it with rope, that he disposed of body in a desolate area, and that he concealed his crime effectively for period of time from January 22, 1978 to March 15, 1978. West's F.S.A. § 921.141(5)(e).

13. Homicide ⇐354

Fear and emotional strain preceding victim's almost instantaneous death may be considered as contributing to the heinous nature of a capital felony.

14. Homicide ⇐354

In view of defendant's statement indicating that eight-year-old victim was screaming prior to her strangulation by defendant, an adult, there was sufficient competent evidence in the record from which trial judge could have found that, for purposes of determining whether to impose death penalty, the murder was heinous, atrocious, and cruel.

15. Homicide ⇐354

For purposes of determining whether death sentence was appropriate, trial court did not err in failing to find that capacity of defendant to conform his conduct to requirements of law was substantially impaired as a result of his marital distress.

Jim Smith, Atty. Gen., and David P. Gauldin, Asst. Atty. Gen., Tallahassee, for appellee.

Michael M. Corin, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and sentence of death.

The victim, eight years of age, left school on January 23, 1978, at about 2:30 P.M. Her body was found on March 15, 1978, in a wooded area near Ocala, Florida, by three men who were gopher hunting. The defendant's involvement in the disappearance and death of the victim was shown through circumstantial evidence and by statements, both written and oral, made by him to officers of the Ocala police department.

In his written statements, the defendant stated that he saw the victim walking home from school about a block and a half from her house and offered to give her a ride home. She got in the car and defendant drove away with her. The defendant remembered "being stopped somewhere and she was screaming and I put my hand over her mouth", and she quit breathing. In his oral statement the defendant said he had removed the clothes from the victim and used some cord which he carried in his car to tie her up so that she would fit into plastic bags. He also said that he tried to have sexual relations with her, but couldn't bring himself to do it. He denied having sexual relations with her.

Two expert witnesses testified that the cause of death was strangulation, but one of the experts stated that the child could have died from manual suffocation. One expert rendered an opinion that the victim's wrists had been taped prior to death. The defendant, in his oral statement, said that he had removed the victim's clothes, but

there was an indication from this statement that the clothes were removed after she quit breathing. However, the state argues that as a matter of logic, the clothes were removed prior to the time the wrists were bound, and, at that time, the victim was still alive.

The jury found the defendant guilty of murder in the first degree, and, after hearing evidence in the penalty phase of the trial, recommended that the defendant be sentenced to death.

The defendant argues that the trial court committed reversible error in failing to instruct the jury on the elements of the underlying felonies of sexual battery and kidnapping. The instructions of the court contained the following:

> The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree, even though there is no premeditated design or intent to kill.
>
> If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime the killing is in the perpetration of or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

Defendant correctly points out that the instruction included references to two crimes which do not exist, to wit: rape and an abominable and detestable crime against nature. Defendant argues that it is an indispensable requisite to a fair trial to instruct the jury on all essential elements of a crime, but the jury was not instructed on the essential elements of sexual battery and kidnapping, the only possible applicable felonies with which the state could have sought a conviction for felony murder. He relies on *Robles v. State*, 188 So.2d 789 (Fla.1966).

[1] The indictment alleged that defendant murdered the victim, unlawfully, from a premeditated design by strangling. Under this charge, the state could prosecute under both a theory of premeditation and a theory of felony-murder. *Barton v. State*, 193 So.2d 618 (Fla.2d DCA 1966), *cert. denied*, 201 So.2d 459 (1967).

[2] The record shows that defendant had visited in the home of the victim and she voluntarily accompanied defendant during the fatal ride. The evidence is sufficient to sustain a finding that the death was caused by strangulation, not by the defendant placing his hand over the mouth of the victim so as to keep her from screaming or yelling. Her hands were tied and taped behind her head, and a rope was around her neck. "Premeditation, like other factual circumstances, may be established by circumstantial evidence." *Larry v. State*, 104 So.2d 352, 354 (Fla.1958).

The final argument of the state was geared toward the single question of whether or not the evidence was sufficient to show a premeditated design on the part of defendant to murder the victim.

In *Knight v. State of Florida*, 394 So.2d 997, 1002 (Fla.1981), we considered that question:

> The first issue concerns the trial judge's failure to instruct the jury on the elements of the underlying felony. The petitioner contends that our decision in *Robles v. State*, 188 So.2d 789 (Fla.1966), is determinative and that a trial court's failure to give an adequate instruction on the underlying felony is a fatal error even when such instruction has not been requested by the defendant. Subsequent to our opinion on the initial appeal in this cause, we decided *State v. Jones*, 377 So.2d 1163 (Fla.1979), which reaffirmed our decision in *Robles v. State*.
>
> The record in the instant case reflects that the trial judge gave the general definitive instructions for homicide but did not specifically instruct upon the elements of the underlying felony of kidnapping or robbery. There was no request or objection by petitioner's trial counsel to this failure to give these instructions.

It is clear that in both *Robles* and *Jones* the primary charge was felony murder and the state in neither case contended the evidence was sufficient to establish premeditated murder. We expressly noted in *Jones* that there was no contention that there was sufficient evidence to establish premeditated murder. We conclude that where there is sufficient evidence of premeditation, the failure to give the underlying felony instruction, where it has not been requested, is not error which mandates a reversal absent a showing of prejudice. *See Frazier v. State*, 107 So.2d 16 (Fla.1958).

. . . .

[T]he record in this cause, and in particular the final argument of counsel, demonstrates that the state, although it mentioned felony murder, strongly argued premeditated murder to the jury. The record reflects that there is not only sufficient but overwhelming evidence of premeditated murder. We find that under the circumstances of this case and our review of the record that neither *Robles* nor *Jones* applies, but *Frazier* does apply. We are satisfied beyond a reasonable doubt that the failure to give the instruction at issue was not prejudicial and did not contribute to the petitioner's conviction. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

See also McKennon v. State, 403 So.2d 389 (Fla.1981).

[3] Although an erroneous or uninvited felony murder instruction was given, the evidence of premeditation was sufficient to render the erroneous instruction harmless.

[4] Of course, it may have been defendant's counsel's strategy to avoid, at all costs, any unnecessary reference to the underlying felonies committed by the defendant during the perpetration of the murder. Perhaps that explains his failure to make any objection to the instruction. Request for an instruction or an objection to a failure to give an instruction is a prerequisite to raising an alleged error on appeal. *Alford v. State*, 280 So.2d 479 (Fla. 3d DCA), *cert. denied*, 284 So.2d 218 (1973); *Flagler v. State*, 198 So.2d 313 (Fla.1967).

[5–7] Defendant says that the trial court committed reversible error in admitting into evidence, over defendant's objection, two photographs of the victim. One photograph in color, was taken at the scene where the body was discovered. The other photograph, apparently taken somewhere else, is of the body and shows the victim's hands taped together with adhesive tape. The guidelines to be followed in determining the admissibility of photographic evidence were set forth by this Court in *State v. Wright*, 265 So.2d 361, 362 (Fla.1972), as follows:

> [T]he current position of this Court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of "whether cumulative", or "whether photographed away from the scene," are routine issues basic to a determination of relevancy, and not issues arising from any "exceptional nature" of the proffered evidence.

If the photograph meets the guidelines set forth above, the fact that the evidence is gruesome and offensive does not bar the admissibility. *Foster v. State*, 369 So.2d 928 (Fla.), *cert. denied*, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979). This is consistent with the reasoning in *Mardorff v. State*, 143 Fla. 64, 196 So. 625, 626 (1940), where the Court said:

> Counsel contends that the pictures tended "to inflame the minds of the jury to a state of passion" and to "prejudice them against" the defendant rendering the evidence inadmissible. That this proof was prejudicial to the defendant there can be no doubt, but, as was so aptly stated in Wharton's Criminal Evidence, 11th Ed., Sec. 773, p. 1321:
>
> "Where they are otherwise properly admitted, it is not a valid objection to the admissibility of photographs that they

tend to prejudice the jury. Competent and material evidence should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible."

In *Lindberg v. State*, 134 Fla. 786, 184 So. 662, we quoted the above authority and approved exhibition to the jury of a picture showing the body of the murder victim.

The colored photograph was relevant to show the crime scene and premeditation. The other photograph, showing the tying of the hands and the tape on the victim's hands, was relevant to show premeditation and the circumstances of death.

At trial the state sought to introduce two other photographs which were excluded by the trial judge upon the objection of the defendant. The trial judge exercised reasoned judgment and prohibited the introduction of duplicitous photographs. *See Alford v. State*, 307 So.2d 433 (Fla.1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The trial court did not commit error in admitting these photographs into evidence.

[8] We now turn to the propriety of the death sentence. The trial court found three aggravating circumstances: 1) that the capital felony was committed while defendant was engaged in or attempting to engage in, or in the flight after committing or attempting to commit rape and/or kidnapping; 2) that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; 3) that the capital felony was especially heinous, atrocious, or cruel.

The trial judge found three mitigating circumstances: 1) that the defendant had no significant history of prior criminal activity; 2) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; 3) that the defendant's age (20) was of significance.

[9] The jury recommended death and the trial judge concurred in that recommendation.

In support of his finding of fact that the capital felony was committed while the defendant was engaged in or attempting to commit or flight after committing or attempting to commit a rape or kidnapping (Fla.Stat. § 921.141(5)(d)), the judge stated:

That the capital felony was committed while the Defendant was engaged in or attempting to engage in or in the flight after committing *kidnapping*, is proven beyond and to the exclusion of a reasonable doubt by Defendant Adams' admission, States Exhibit # 49, in which he says:

After getting off from work as a prison guard at Lowell Prison, he went to check his mail at his old residence, which is approximately two blocks from the residence of the victim, Trisa Gail Thornley, age 8, and saw her walking home from school about one and a half blocks from her home. He knew the victim and offered to give her a ride home. She got into Defendant's car and he started towards her home, then turned away towards the Pine Street Shopping Center; then out State Road 200 towards the Central Florida Community College. He remembered being stopped somewhere when she started screaming and he put his hand over her mouth and she stopped breathing.

The above fact of kidnapping is also supported by the testimony at the trial of the Defendant by police officers S. H. Stephenson, John E. Fluno and W. R. Fugitt regarding the written statements made by the Defendant and the oral statements concerning her death and her disappearance that he gave the three officers.

Kidnapping is also evidenced by the testimony of Trisa Gail Thornley's third grade school teacher, Carolyn Andrews, who observed the victim leave school at approximately 2:20 P.M. on January 23, 1978, and by Trisa Gail Thornley's aunt and uncle, Lawson and Theresa Hopper, and the victim's sister, Tracy Thornley, who stated that the victim, Trisa Gail

Thornley, did not return home from school that day as she usually did.

For additional support that 921.141(6) [sic] (d), Florida Statutes, is proved beyond and to the exclusion of a reasonable doubt is the evidence proving that the capital felony was committed while the Defendant was engaged in or attempting to engage in or flight after committing rape is proven beyond and to the exclusion of a reasonable doubt by the testimony of Officer Stephenson who was present at the Defendant's interview, who stated that Defendant Adams said that he thought he tried to but couldn't do it, or couldn't bring himself to do it, and that her body was found nude with her hands taped behind her back, such tape applied to the victim, by sworn testimony of pathologist, Doctor Gertrude Warner of Ocala, Florida, as being applied around the wrists while the victim, Trisa Gail Thornley, was still alive.

Defendant argues that these findings do not prove that the victim's death occurred during or after the commission of a kidnapping. The state replies that the evidence is sufficient to show the crime of kidnapping was committed and cites *Miller v. State*, 233 So.2d 448 (Fla. 1st DCA 1970).

In *Brown v. Wainwright*, 392 So.2d 1327, 1331 (Fla.), *cert. denied*, — U.S. —, 102 S.Ct. 342, 70 L.Ed.2d 407 (1981), we described our function in reviewing a death sentence:

> This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. This type of review is illustrated in *Elledge v. State*, 346 So.2d 998 (Fla.1977), where we remanded for resentencing because the procedure was flawed—in that case a nonstatutory aggravating circumstance was considered. *See also Brown v. State*, 381 So.2d 690 (Fla.1980); *Kampff v. State*, 371 So.2d 1007 (Fla.1979).
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great. *Proffitt v. Florida*, 428 U.S. 242 [96 S.Ct. 2960, 49 L.Ed.2d 913] (1976); *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943 [94 S.Ct. 1951, 40 L.Ed.2d 295] (1974). In those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life imprisonment. *See Malloy v. State*, 382 So.2d 1190 (Fla.1979); *Burch v. State*, 343 So.2d 831 (Fla.1977); *Jones v. State*, 332 So.2d 615 (Fla.1976).
>
> Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

(Footnote omitted.) There appears to be sufficient competent evidence in the record from which the judge could properly find that the capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, a rape or kidnapping.

[10, 11] Defendant argues that there is no crime of rape in Florida and that the

trial judge used a non-statutory aggravating factor in imposing the death sentence. The statute penalizing rape, section 794.01, Florida Statutes (1972), was repealed by chapter 74-121, section 1, Laws of Florida. Acts which would have constituted rape or attempted rape would constitute a sexual battery or attempt to commit sexual battery by virtue of section 794.011, Florida Statutes (1977). The word "rape" in section 921.141(5)(d) had not yet been changed to "sexual battery". Due process requires only that the law give sufficient notice so that men may conform their conduct so as to avoid that which is forbidden. The act itself, rather than its nomenclature, constitutes the aggravating circumstances. The trial judge did not err in finding defendant's acts constituted an aggravating factor.

[12] Defendant next argues that the trial judge erred in finding that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. § 921.-141(5)(e), Fla.Stat. The trial judge made the following finding of fact:

> That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody is proven beyond and to the exclusion of a reasonable doubt by the facts stated above proving *kidnapping* and *rape* by the additional fact that Trisa Gail Thornley was found dead on March 15, 1978, which prevented any testimony on her part concerning kidnapping and rape some seven weeks after her disappearance while walking home from school.

The record shows that the victim knew and could have identified defendant; that he encased the body in white plastic garbage bags and tied it with rope; that he disposed of the body in a desolate area; that he concealed his crime effectively for a period of time from January 23, 1978, to March 15, 1978.

In *Riley v. State*, 366 So.2d 19 (Fla.1978), the robbery victim, who knew and could identify the defendant, had been bound and gagged. He was then shot in the head after one of the perpetrators expressed a concern for subsequent identification. This Court concluded that the aggravating circumstance existed because the defendant had killed the victim to avoid identification and arrest. *See also Hoy v. State*, 353 So.2d 826 (Fla.1977), *cert. denied*, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978); *Jackson v. State*, 366 So.2d 752 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979).

There was sufficient competent evidence in the record from which the judge could find that defendant committed this capital felony in an effort to avoid or prevent a lawful arrest.

Defendant also says that the trial court erred in finding that the capital felony was especially heinous, atrocious, or cruel. The trial judge made the following finding of fact:

> That the capital felony was especially heinous, atrocious or cruel is proven beyond and to the exclusion of a reasonable doubt by expert medical testimony that the autopsy, performed by Doctors Gertrude Warner and William Shutze, showed a bruise on one arm, inflicted prior to death, that the autopsy showed swelling in the hands induced by tight binding with tape prior to death, State Exhibit # 17, that the autopsy showed that the body was a nude body of an eight year old girl whose hands were tightly taped behind her back prior to death, which showed that Trisa Gail Thornley had time to anticipate her murder and that the autopsy and photographs showed seven coils of rope with a circumference of nine and three-fourths inches around the neck of Trisa Gail Thornley as shown in evidence by State Exhibit # 16, and that the child's body was placed in a plastic garbage bag and thrown in a wooded area some three miles from her home.

Defendant argues that this aggravating circumstance is devoid of factual and legal support. We disagree.

[13, 14] The fear and emotional strain preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of the capital felony. *Knight v. State*, 338 So.2d 201 (Fla.1976). A homicide committed through strangulation has been held to be especially heinous, atrocious, and cruel. *Alvord v. State*, 322 So.2d 533 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). From defendant's statement we find that the victim was "screaming" prior to death. A frightened eight-year-old girl being strangled by an adult man should certainly be described as heinous, atrocious, and cruel. There was sufficient competent evidence in the record from which the trial judge could find the presence of this aggravating circumstance.

[15] Although the trial judge found, as a mitigating factor, that the capital felony was committed while defendant was under the influence of extreme mental or emotional disturbance, the defendant says that there should be an independent determination and finding that at the time the crime was committed the defendant's capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was substantially impaired. The defendant says that his deteriorating marital situation and his wife's apparently blatant infidelity with one of his friends led to his extreme mental or emotional disturbance and clearly hampered his capacity to appreciate the criminality of his conduct or to conform it to the requirements of law. There is little, or no, causal relationship between defendant's marital problems and an eight-year-old little girl. There was no testimony that defendant had suffered from mental illness in the past. An expert witness testifying for the defense said that, in his opinion, the defendant knew the difference between right and wrong on the date of the commission of the offense. The trial court did not err in failing to find that the capacity of defendant to conform his conduct to requirements of law was substantially impaired as a result of his marital distress.

The findings of the trial judge were sufficient to show that the sentence of death resulted from reasoned judgment. This reasoned judgment comports with our consideration of other cases and the sentence of death was appropriate under the circumstances. There being no reversible error, the judgment and sentence of the trial judge are affirmed.

It is so ordered.

SUNDBERG, C. J., and OVERTON and ALDERMAN, JJ., concur.

BOYD, J., concurs in part and dissents in part with an opinion.

McDONALD, J., concurs as to conviction and dissents as to sentence.

BOYD, Justice, concurring in part and dissenting in part.

I concur in that part of the majority opinion affirming appellant's conviction of murder in the first degree.

One of the principal functions of this Court in considering cases in which the death penalty has been ordered is to review the aggravating and mitigating circumstances to assure that similar punishment is given for similar crimes.

The trial judge found three mitigating circumstances: (1) that the defendant had no significant history of prior criminal activity; (2) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (3) that the defendant's age (20) was of significance.

In weighing the aggravating and mitigating circumstances of this case, and comparing it with prior similar crimes of violence, it is my opinion that the law requires this Court to order a reduction in the sentence to life imprisonment without eligibility for parole for twenty-five years.

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MARION COUNTY

CRIMINAL CASE NO. 78-366 C F A-O-1

STATE OF FLORIDA,

Plaintiff,

vs.

AUBREY DENNIS ADAMS,

Defendant.

PROCEEDINGS: Hearing

BEFORE: The Honorable William F. Edwards
Circuit Judge
Fifth Judicial Circuit of Florida

DATE AND TIME: September 7, 1984, 2:30 p.m.

PLACE: Courtroom D
Marion County Courthouse
Ocala, Florida

REPORTED BY: Jack K. Simmons, Jr., RPR-CP
Deputy Official Court Reporter
Fifth Judicial Circuit of Florida
Ocala, Florida

APPEARANCES: Gordon C. Oldham, Esquire
State Attorney
Ben Ayres, Esquire
Assistant State Attorney
Margene Roper, Esquire
Assistant Attorney General
Attorneys for State of Florida

APPEARANCES: Kenneth R. Hart, Esquire
Philip J. Padvano, Esquire

PROCEEDINGS

THE COURT: Before we begin, I would like for each of you to identify yourself for the record, please. Let's start over here with defense counsel.

MR. PADVANO: Your Honor, I'm Phil Padvano of Tallahassee for the defendant. Mr. Hart of Tallahassee will be presenting the hearing to the Court this morning, Kenneth Hart.

THE COURT: All right.

MR. OLDHAM: State Attorney Gordon Oldham of the Fifth Judicial Circuit.

MR. AYRES: Assistant State Attorney Ben Ayres.

MS. ROPER: Assistant Attorney General Margene Roper, I'm handling the appeal and assisting Mr. Ayres.

THE COURT: I would suggest perhaps that counsel might want to take a yellow pad if you're going to try to follow me. I'm prepared to make an order.

This order is to be a consolidated order concerning all six motions filed by the defendant. Statement of fact and opinion: Nothing in this order that I say should be taken to be derogatory towards the defendant's present attorneys because it is certainly not intended by this Court to be so. On the contrary, I commend Mr. Hart and his law firm for the manner in which they are handling this case.

This Court is certainly aware of the recent case of Williams vs. State, First District Court of Appeals Case Nos. AY-161, wherein the First District Court of Appeals indicated that the defendant could not waive his right under Rule 3.850. However, this Court urges the Supreme Court of the State of Florida to visit this question in this case and rule that the defendant can waive his rights to a 3.850 review under specific circumstances wherein the defendant intentionally fails to utilize his rights to a 3.850 review within a reasonable time after defendant has discovered or should have discovered the now complained of defects and when this intentional delay will frustrate the judicial process in an attempt to carry out a lawful sentence.

This Court was handed the six motions at about 4:00 p.m. on 5 September, 1984. I have not had sufficient time to draft written orders on each of these and therefore, ask the Supreme Court and the Federal Courts to overlook this technicality and accept this verbal order rendered in open court as soon as it is reduced to writing and certified by the Official Court Reporter. This is necessary in order to maintain an orderly appeal of the defendant's case through the courts. If this procedure is not accepted by the Appeals Court, then the State Attorney is directed to immediately

prepare a proposed order, transmit it to the defendant's attorney and then present it to me as soon as possible Monday morning. I'll be out of town until then.

This Court is aware that the Supreme Court has urged the lower court to hold evidentiary hearings on Rule 3.850 proceedings, see Jones vs. State, 446 Southern 2nd 1059, a Florida Supreme Court, 1984, but also recognize that in an appropriate case, the lower court may deny the defendant's request without an evidentiary hearing, see Martin v. State, Supreme Court of Florida Case Nos. 65-788, decided August 28th, 1984.

This Court is of the opinion that in this cause, no evidentiary hearing is required because of the reasons hereinafter set forth as I rule on each point of the 3.850 motion.

This Court is also aware of the rule that if the lower court does not hold an evidentiary hearing, it should attach that part of the record that conclusively shows that the defendant is entitled to no relief because of the defendant's shotgun approach to his 3.850 motion and because the Court is of the opinion that the Appeals Court will want to review the entire record in this case, the Court hereby directs the clerk to forward the entire file to the Appellate Court and this Court attaches the entire file to this order

as grounds for showing the defendant is not entitled to any relief.

Order on motions: Defendant's motion for insolvency is granted and the defendant is declared to be indigent under the meanings of the Florida law and Rule 3.111, Florida Rules of Criminal Procedure; two, defendant's motion for appointment and payment of expert investigators being the same is hereby denied upon either of the following grounds: A, as to that portion that requests experts to aid defendant's present counsel, the last sentence of Paragraph 4 seems to be requesting that this Court has no jurisdiction for such a court order as the defendant would have to file a writ of prohibition against the person responsible for carrying out the Governor's order. If defendant's attorneys now are suggesting defendant's present insanity is reasons for not carrying out said order or on the second reason, that this request is moot, based upon the ruling to be hereafter made concerning defendant's 3.850 motion.

Number three: Defendant's conditional motion for continuance is moot due to the ruling to be hereinafter made concerning defendant's application to stay execution.

Four: Defendant's application for stay of execution is hereby denied based upon the following reasoning: The law in this state and in the United States of America

is that due process requires that the defendant be given ample time to pursue his constitutional rights. The defendant has had since 16 January, 1979, to seek review of this case and to bring the matters he now attempts to raise before an appropriate court. On 4 October, 1982, certiorari to the United State Supreme Court was denied, leaving the defendant with his right to bring a 3.850 motion in this Court. The defendant has been aware or should have been aware of the irregularities he now complains of and has voluntarily chosen not to bring these to this Court's attention for approximately two years. Now he attempts to bring his twelfth hour motion to this Court strictly for the purpose of frustrating the judicial process.

In this Court's opinion, defendant has had more than a reasonable amount of time to properly present his post-conviction motions and if he has elected not to do so, then he cannot now gain by his own wrongdoing.

Number five: Defendant's motion for an evidentiary hearing and for production of defendant at that hearing is hereby denied based upon the rulings of this Court to be hereinafter entered on defendant's motion for post-conviction relief to vacate judgment and sentence rendering the same moot.

Paragraph 6: Defendant's motion for post-conviction

relief to vacate judgment and sentence is hereby denied based upon the following grounds as to each point: The defendant's first point is a death penalty based upon a verdict of guilty, which in turn is based upon a finding of premeditated murder or an alternative theory under the felony murder rule violates the Fifth, Sixth, Eighth and Fourteenth Amendments. Relief is denied as to this point because this was or should have been raised on defendant's direct appeal and not now by way of a 3850 motion, see McCrae vs. State, 437 Southern 2nd 1388, Florida 1983.

Defendant's second point is defendant's conviction and sentence were based on a statute declared unconstitutional prior to the date of the offense. This violated his rights to a fair trial and to due process under the Fifth, Sixth and Fourteenth Amendments. Relief is denied as to that point because this was or should have been raised on defendant's direct appeal and not by way of a 3.850 motion at this time. Again, McCrae vs. State, I've already given you the cite for that.

The third point defendant raises is because of the trial court's failure to instruct the jury on the elements of the underlying felony murder offense, defendant was denied a fair trial and due process under

the Fifth, Sixth and Fourteen Amendments and a sentence of death would be violative of the Eighth Amendment, relief is denied as to this point because failure to give this instruction in this particular case is not error, see Dobbert, Jr., vs. State, Supreme Court Case No. 65-782 and 65-465, decided August the 28th, 1984, and also because this was or should have been raised on defendant's direct appeal and not by way of a 3.850 motion, see McCrae vs. State.

Defendant's fourth point request is or objection is mandated instructions to the jury in the penalty phase of the capital trial to consider all of the aggravating circumstances specified in the death penalty statute creates a substantial risk that death is imposed on the basis of aggravating circumstances not supported by the evidence and are violative of the Eighth and Fourteenth Amendments. Relief is denied as to this point because this was or should have been raised on defendant's direct appeal and not by way of a 3.850 motion, McCrae v. State.

The fifth point, by allowing the jury to consider all degrees of homicides regardless of the evidentiary basis for same, the Florida death penalty statute violates the Eighth and Fourteenth Amendments. Relief is denied as to this point because this was or should

have been raised on defendant's direct appeal and not by way of a 3.850 motion, McCrae v. State.

Six, by requiring that the dealth penalty recommendation be agreed upon by seven or more jurors, the jury instructions violated the Fifth, Sixth and Fourteenth Amendments, relief is denied as to this point because this was or should have been raised on defendant's direct appeal and not by way of a 3.850 motion, see McCrae v. State.

Number seven, by failing to clearly explain the nature and function of mitigating circumstances and failing to inform the jury they could recommend life even though they found aggravating circumstances, the jury instructions violated defendant's rights under the Fifth, Eighth and Fourteenth Amendments. Relief is denied as to this point because this was or should have been raised on defendant's direct appeal and not by way of a 3.850 motion, see McCrae v. State.

The execution of the -- point eight, the execution of the defendant, in view of the overwhelming mitigating circumstances in this case constitutes excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments, relief as to this point is denied because this was or should have been raised in defendant's direct appeal and not by way of a 3.850

motion, see McCrae v. State.

Number nine, the application of Section 921.141 (5e), Florida Statutes, in this case is in violation of rights under the Eighth and Fourteenth Amendments in that aggravating circumstances was applied in an arbitrary fashion. Relief under this point is denied because this point was or should have been raised in the defendant's direct appeal and not by way of a 3.850 motion, see McCrae v. State.

Number ten, defendant was tried before a jury for murder in the first degree while he was not competent to stand trial. This deprived him of effective assistance of counsel and due process under the Sixth and Fourteenth Amendments. Relief is denied as to this point based upon either of the following grounds: First, because this point was or should have been raised in the defendant's appeal and not by way of a 3.850 motion, see McCrae v. State; or a review of this motion, point twelve, subparagraphs 10, 11 and 12, and a review of the court file shows that this defense was considered by the defendant's attorneys and discarded as trial tactics after a thorough investigation of the law and facts. Strategic choices of a thorough investigation of the law and facts are virtually unchallengeable, see Strickland, 104, Supreme Court, United States

2052, 1984, citing Engle (spelling) E-n-g-l-e v. Isaac (spelling) I-s-a-a-c, 456 United States 107.

Eleventh point of the defendant is that the defendant is entitled to a judicial determination of whether he is competent to proceed in this court. Relief is denied as to this point in that in this 3.850 proceeding, reserving unto the defendant his right to bring a writ of prohibition in the appropriate court and the reasoning behind this is because this type of attack is not allowed under the 3.850. There has been no attempt to attack the sentence.

Number twelve, defendant was deprived of the effective assistance of counsel at trial and at sentencing in violation of his rights under the Sixth and Fourteenth Amendments. Relief is denied as to this point upon the grounds as set forth herein as to each subpoint pointed out by the defendant. See subparagraphs 1 through 14 of Pages 21 through 23 of the defendant's motion for post-conviction relief to vacate judgment and sentence.

Subpoints 1 through 9 and 13 through 14 was or should have been raised in the defendant's direct appeal and not in a 3.850 motion, citing McCrae v. State. Subpoints 10 through 12, the reading of the motion and review of the file will show that these points are

clearly frivolous and of no merit. The defendant had two private attorneys, both known by this Court and both highly respected in the legal community. The lead counsel has an excellent background in criminal law both as a prosecutor and defense attorney and vast trial experience. A review of the file will show a thorough investigation of the law and facts by the defendant's trial counsel and their strategy should not now be challengeable. At best, defendant now -- excuse me -- at best, defendant's now assertion that his lawyers should have done these things set out in subparagraphs 10 through 13 is a mere speculation as to what an expert may have said and that had the defendant finally found an expert who could have qualified before the Court in that field and had the witness so testified that the Court and/or jury would have accepted and believed the witness, thereby changing the outcome of the trial. Pure speculation as to what might have possibly happened is not enough to have the lower court grant a 3.850 motion hearing, citing Martin vs. State, Supreme Court Case No. 65-788, decided August 28th, 1984.

A review of the file conclusively shows that the defendant's trial counsel clearly reached and exceeded the criteria to be applied in evaluating the merits of the claim of ineffective assistance of counsel as set

forth in the cases of Dobbert vs. State, Supreme Court Case Nos. 65-465 and 65-782, decided August 28th, 1984, also as set forth in Knight vs. State, 394 Southern 2nd 997, Florida Supreme Court 1981 and also under the case of Strickland v. Washington, 104 Supreme Court 2052, 1984.

This order is done and ordered in open court in Ocala, Marion County, Florida, at 2:45 p.m. on this, the 7th day of September, 1984, by William F. Edwards, Circuit Judge. The court reporter is hereby directed to immediately transcribe this order, to file the original in the court file, to forward a certified copy to Mr. Hart -- what court do you want the certified copy sent to -- the Fifth or Supreme Court?

MR. HART: Supreme Court of Florida.

THE COURT: Supreme Court of the State of Florida, to deliver a certified copy to The Honorable Gordon Oldham or his representative and to deliver a certified copy to Mr. Kenneth R. Hart or his representative. Hearing concluded.

(Hearing concluded.)

CERTIFICATE

STATE OF FLORIDA)
COUNTY OF MARION)

I, Jack K. Simmons, Jr., RPR-CP, Deputy Official Court Reporter, Fifth Judicial Circuit of Florida, do hereby certify that a hearing in the case of State of Florida vs. Aubrey Dennis Adams was held on the 7th day of September, 1984; that I was authorized to and did report stenographically the proceedings and evidence in said cause and that the foregoing pages numbered 1 through 14, inclusive, constitute a true and correct transcription of my stenographic report of the proceedings of said cause.

IN WITNESS WHEREOF I have hereunto affixed my hand this 7th day of September, 1984, at Ocala, Marion County, Florida.

Jack K. Simmons, Jr., RPR-CP
Deputy Official Court Reporter
Fifth Judicial Circuit of Florida

tion would have rendered the victim unconscious and unable to feel pain by the time the stabbing occurred. Even so, strangulation itself, with the victim fully aware of her impending doom and begging the appellant not to proceed with his evil design, was heinous, atrocious, or cruel under these circumstances. *See Smith v. State*, 407 So.2d at 903.

Appellant argues that the sentence of death is disproportional to his crime. In support of this contention he relies upon *Blair v. State*, 406 So.2d 1103 (Fla.1981); *Kampff v. State*, 371 So.2d 1007 (Fla.1979); and *Chambers v. State*, 339 So.2d 204 (Fla. 1976). Those cases, however, are distinguishable. In *Blair*, wherein several aggravating factors had been improperly found and there was a mitigating factor, this Court remanded for imposition of a life sentence because the death sentence was disproportional in that particular case. The defendant had killed his wife by shooting her after she threatened to tell the police about the defendant's relationship with her daughter. The mitigating factor in that case was that the defendant had no significant history of prior criminal activity. The only valid aggravating factor was that the felony was committed either for the purpose of preventing a lawful arrest or to disrupt or hinder the enforcement of law in concealing and preventing the reporting of sexual battery upon a minor female child.

[7] In *Kampff*, wherein the defendant killed his former wife by shooting her, there were mitigating circumstances and no proper aggravating circumstances. In *Chambers*, wherein the defendant beat his victim to death, the jury recommended life. When a jury override is involved, it is inappropriate for the trial court to impose the death penalty unless the facts suggesting death are so clear and convincing that no reasonable person could differ. *Tedder v. State*, 322 So.2d 908 (Fla.1975).

The state relies upon *King v. State*, 436 So.2d 50 (Fla.1983) and *Harvard v. State*, 414 So.2d 1032 (Fla.1982), *cert. denied*, 459 U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 979 (1983), in arguing proportionality. These cases are more similar to the present case in that both also involved defendants killing women with whom they had a relationship after a previous conviction for a similar violent offense. The death sentences were affirmed in these cases.

[8] Appellant correctly points out that in the present case there is a mitigating factor, unlike in *King* and *Harvard*. The trial court did find that the defendant was acutely emotionally disturbed at the time of the offense, but indicated that there was some question as to the degree of the defendant's emotional disturbance, i.e., whether it was extreme. The court found that the mitigating circumstance did not outweigh the aggravating circumstances. Comparing the murder and other circumstances herein with those in the cited cases, and past capital cases, we conclude that the sentence imposed here is not comparatively disproportionate. We affirm as to this point.

For the reasons expressed, we affirm the conviction and sentence of death.

It is so ordered.

BOYD, C.J., and ADKINS, OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

Aubrey Dennis ADAMS, Jr., Appellant,

v.

STATE of Florida, Appellee.

and

Aubrey Dennis ADAMS, Jr., Petitioner,

v.

Louie L. WAINWRIGHT, etc., Respondent.

Nos. 65845, 65853.

Supreme Court of Florida.

Sept. 11, 1984.

Defendant filed motion to vacate his conviction and sentence. The Circuit

Court, Marion County, William F. Edwards, J., denied the motion, and the defendant appealed. The defendant also filed a motion for stay of execution and petitioned for habeas corpus. The Supreme Court, Adkins, J., held that: (1) claims regarding whether defendant received ineffective assistance of trial counsel could have been raised on direct appeal and, therefore, were not properly entertained in a motion to vacate, set aside or correct sentence; (2) the failure of trial counsel to interpose objections to a general verdict of guilty and to particular jury instructions was not such a serious omission or such a deficient performance as to deprive the defendant of a fair trial; (3) the defendant's competency to stand trial was a matter which either was or should have been raised on direct appeal and, further, testimony that the defendant suffered from mental disorder at the time of his motion did not establish that he suffered from the disorder at trial; and (4) the conduct and performance of the defendant's appellate counsel was not substantially deficient.

Order affirmed; motion for stay of execution denied; petition for writ of habeas corpus denied.

McDonald, J., dissented with opinion.

1. Criminal Law ⇐998(3)

Claims that defendant received ineffective assistance of trial counsel when counsel failed to object to general verdict of guilty which was based either upon finding of premeditated murder or alternative theory of felony-murder rule and to jury instructions were matters which could have been raised on direct appeal from first-degree murder conviction and were not properly entertained in motion to vacate, set aside or correct sentence. West's F.S.A. RCrP Rule 3.850.

2. Criminal Law ⇐641.13(2)

In first-degree murder prosecution, failure of trial counsel to object to general verdict of guilty which was based either upon finding of premeditated murder or alternative theory under felony-murder rule or to various jury instructions during trial was not such serious omission or such a deficient performance as to deprive defendant of fair trial. U.S.C.A. Const. Amend. 6.

3. Criminal Law ⇐998(3, 13)

Defendant's competency to stand trial was matter which either was or should have been determined on direct appeal, not in motion to vacate, set aside or correct sentence. West's F.S.A. RCrP Rule 3.850.

4. Criminal Law ⇐998(17)

Testimony that defendant suffered from mental disorder known as catathymic amnesia, rendering him incapable of recalling traumatic experiences, which was offered in support of motion to vacate, set aside or correct sentence, was not evidence that he suffered from disorder at time of trial. West's F.S.A. RCrP Rule 3.850.

5. Criminal Law ⇐998(19)

None of the grounds asserted by defendant as deficiencies of his trial counsel warranted evidentiary hearing either because they were not cognizable in postconviction proceedings or were adequately set forth in his motion for postconviction relief so that no evidentiary hearing was necessary. West's F.S.A. RCrP Rule 3.850; U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.13(7)

Conduct of defendant's appellate counsel was not substantially deficient. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐1166.11(5)

Even if appellate counsel's performance was deficient, defendant was not prejudiced. U.S.C.A. Const.Amend. 6.

Kenneth R. Hart and Timothy B. Elliott of Ausley, McMullen, McGehee, Carothers & Proctor and Philip J. Padovano, Tallahassee, for appellant/petitioner.

Jim Smith, Atty. Gen. and Margene A. Roper, Asst. Atty. Gen., Daytona Beach, for appellee/respondent.

ADKINS, Justice.

This case is before us on appeal from the trial court's denial of appellant's motion to vacate his conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850. We also have before us a motion for stay of execution and a petition for habeas corpus. We have jurisdiction. Art. V, § 3(b)(1), (9), Fla.Const.

This case has previously been before us on direct appeal from appellant's conviction of first-degree murder and sentence of death. At that time, we affirmed appellant's conviction and sentence. *Adams v. State*, 412 So.2d 850 (Fla.1982). A writ of certiorari to the United States Supreme Court was denied. *Adams v. Florida*, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982).

The facts of this case are set forth in this Court's opinion on direct appeal and will not be repeated here.

[1] Adams raises two points in his post-conviction petition. In the first of these, he claims that he received ineffective assistance of trial counsel when trial counsel failed to object to: 1) a general verdict of guilty which was based either upon a finding of premeditated murder or an alternative theory under the felony murder rule; 2) jury instructions which allowed the jury to consider all the aggravating circumstances listed in the death penalty statute even though there was no evidence to support some of these; 3) jury instructions which allowed the jury to consider all lesser degrees of homicide even though there was no evidentiary basis for them; 4) jury instructions that required the death penalty recommendation to be agreed upon by seven or more jurors, even though six is sufficient to recommend life; and 5) jury instructions that failed to clearly define and explain the nature and function of mitigating circumstances and failed to inform the jury they could recommend life even though they found aggravating circumstances. These are all matters which could have been raised on direct appeal and which, as the trial judge correctly held, were not properly entertained in a 3.850 motion. *McCrae v. State*, 437 So.2d 1388 (Fla.1983).

[2] The failure of trial counsel to interpose objections to these matters during trial was not such a serious omission or such a deficient performance as to deprive defendant of a "fair trial, a trial whose result is reliable." *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Adams' second point in his post-conviction petition is likewise without merit. He argues that the trial court erred in refusing an evidentiary hearing concerning his competency to stand trial or to participate in the sentencing phase of his trial and concerning the competency of his trial counsel.

[3, 4] Regarding his competency to stand trial, Adams now argues that an expert will testify that he now suffers from a mental disorder known as catathymic amnesia, which renders him incapable of recalling traumatic experiences, and this mental disorder in turn rendered him incompetent to stand trial. Once again, his competency to stand trial is a matter which either was or should have been determined on direct appeal. *McCrae*. In his direct appeal we noted that there was no testimony that Adams had suffered from mental illness in the past. 412 So.2d at 857. In any event, the testimony that is being offered is a diagnosis of Adams' present condition and is not evidence that he suffered from this disorder at the time of trial.

[5] Finally, none of the grounds asserted by Adams as deficiencies of his trial counsel warranted an evidentiary hearing either because they were not cognizable in post-conviction proceedings or were adequately set forth in his motion for post-conviction relief so that no evidentiary hearing was necessary.

In his habeas petition, Adams argues that he received ineffective assistance of counsel at the appellate level.

The standards to be applied in determining whether a defendant was denied his sixth amendment right to effective assist-

ance of counsel were set forth by the United States Supreme Court in *Strickland*. The standards enunciated in that case do not "differ significantly" with those espoused by this Court in *Knight v. State*, 394 So.2d 997 (Fla.1981); *Jackson v. State*, 452 So.2d 533, 535 (Fla.1984). *See also Downs v. State*, 453 So.2d 1102 (Fla.1984). *Strickland* held that a defendant's claim for ineffective assistance of counsel has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

104 S.Ct. at 2064.

To prove prejudice, the Court further stated that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* 104 S.Ct. at 2068.

[6, 7] In applying the principles of *Strickland* to the case at bar, we find that Adam's claim of ineffective assistance of counsel on appeal, as well as at trial, must fail. The conduct and performance of Adam's appellate counsel was not substantially deficient under the circumstances. The record reflects that counsel properly prepared the case and that his strategy and decisions during the course of his representation of Adams conformed to the standards required of professionally competent counsel. Even if this Court had found counsel's performance to be deficient, we would also have concluded that his performance did not prejudice Adams.

Accordingly, we affirm the order of the trial court denying Adam's motion for post-conviction relief. The motion for stay of execution is denied. Adam's petition for writ of habeas corpus is also denied.

It is so ordered.

BOYD, C.J., and OVERTON, ALDERMAN, EHRLICH and SHAW, JJ., concur.

McDONALD, J., dissents with an opinion.

McDONALD, Justice, dissenting.

I recognize that the issue was considered in the original appeal, but I adhere to the position that in view of the mitigating circumstances in this case, and the highly questionable aggravating factor that Adams killed the eight-year-old to avoid arrest, the death penalty is improper and disproportionate for Adams. Perhaps it is because of this conclusion that I search the record to justify a stay of an event that should not transpire. In any event, I believe that there were adequate grounds alleged in the 3.850 motion to require an evidentiary hearing on some of the claims.*

* Adams submits that his trial attorney:

> (9) Remained mute while the prosecution argued that the jury consider a statutory aggravating circumstance for which there was insufficient evidentiary support. The aggravating circumstance argued was that the murder was committed for the purpose of avoiding or preventing a lawful arrest. There was absolutely no evidence to support this. Counsel thereby permitted the jury to be influenced by and to consider aggravating circumstances which were not supported by evidence and thereby violating Defendant's rights to due process. *See e.g., Gregg v. Georgia*, 428 U.S. 153, 198, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976).
>
> (10) Failed to present expert testimony as to the degree to which Defendant could control his actions or conform them to the requirements of the law.
>
> (11) Failed to adequately investigate the issue of Defendant's competency to stand trial and assist in the preparation of his defense and the issue of Defendant's sanity at the time of the alleged offense.
>
> (12) Limited the pre-trial psychiatrist examination and evaluation of the Defendant to one psychiatrist. This hampered his ability to recognize that the Defendant may have been in-

Accordingly, I would grant a stay and remand to the trial court for further proceedings.

THE FLORIDA BAR, Complainant,

v.

Gary A. POE, Respondent.

No. 64812.

Supreme Court of Florida.

Sept. 20, 1984.

Original Proceeding—The Florida Bar.

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, and David G. McGunegle, Bar Counsel, Orlando, for complainant.

L. Edward McClellan, Jr., Ocala, for respondent.

PER CURIAM.

This cause is before the Court on the respondent's conditional guilty plea to violations of article XI, Rules 11.02(3)(a), 11.02(4) and 11.02(4)(c) of the Integration Rule of The Florida Bar, and Disciplinary Rules 1-102(A)(4), 6-101(A)(2), 6-101(A)(3), 7-101(A)(1), 7-101(A)(2), and 9-102(B)(3) of the Code of Professional Responsibility of The Florida Bar. We approve the conditional guilty plea, and, in accordance with the plea, publicly reprimand the respondent, direct that he be placed on two years' probation, and require that he submit quarterly caseload reports to The Florida Bar.

The respondent shall appear before the Board of Governors of The Florida Bar for a public reprimand and this opinion shall be published in *Southern Reporter*.

Costs in the amount of $1,021.33 are assessed against the respondent.

It is so ordered.

OVERTON, Acting C.J., and ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

CONTINENTAL VIDEO CORPORATION, Petitioner,

v.

HONEYWELL, INC., etc., Respondent.

No. 63058.

Supreme Court of Florida.

Sept. 27, 1984.

Application for Review of the Decision of the District Court of Appeal—Direct Conflict of Decisions; Third District—Case No. 81-1978.

Larry S. Stewart, James B. Tilghman, Jr. and Bruce A. Christensen of Floyd, Pearson, Stewart, Richman, Greer, Weil & Zack, Miami, for petitioner.

G. William Bissett of Preddy, Kutner & Hardy, and James E. Tribble of Blackwell, Walker, Gray, Powers, Flick & Hoehl, Miami, for respondent.

Henry I. Smyler, Miami, amicus curiae for Alarm Association of Florida, Inc.

Fred R. Ober, Henry M. Knoblock and Kathleen M. Williams of Fowler, White, Burnett, Hurley, Banick & Strickroot, Miami, amicus curiae for Wells Fargo Alarm Services.

Lawrence A. Fuller of Fuller & Feingold, Miami Beach, amicus curiae for Jewelers Mut. Ins. Co.

competent to stand trial as well as to identify other potential mitigating factors such as the ability to control his actions or to conform them to the requirements of the law.

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PLAINTIFFS	DEFENDANTS
(1) AUBREY DENNIS ADAMS	(A) LOUIE L. WAINWRIGHT (B) JIM SMITH

DEATH PENALTY

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

Petition for Writ of Habeas Corpus filed by state prisoner claiming denial of federal constitutional rights. 28 U.S.C. §2254

ATTORNEYS

(1) KENNETH R. HART, ESQ.
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904/252-1067

AND

MARK MENSER, ESQ.
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	FILING FEES PAID			STATISTICAL CARDS	
X CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				85	10/84
				86	

DATE	NR.	PROCEEDINGS	
09-14-84	*	Case papers filed by Kenneth Hart, counsel for petitioner.	ja
	1	MOTION for Leave to Proceed In Forma Pauperis, by petitioner.	ja 1-4
	*	RECEIVED proposed Order (1).	ja —
	2	PETITION for Writ of Habeas Corpus by a Person in State Custody.	ja 5-90
	3	MOTION for Leave to File Enlarged Petition for Writ of Habeas Corpus, by petitioner.	91-93 ja
	*	RECEIVED proposed Order (3).	ja
	4	MOTION for Stay of Execution, by petitioner.	ja 94-96
	5	MEMORANDUM of Law in Support of Petitioner's Application for Stay of Execution (4).	97-110 ja
	*	RECEIVED proposed Order (4).	ja
	6	MOTION to Admit Counsel Pro Hac Vice, by petitioner.	ja 111-115
	*	RECEIVED proposed Order (6).	ja —
	*	Pursuant to standard operating procedures, the following individuals were telephonically advised by the Jacksonville Division Manager of the filing of the Petition and Motion for Stay of Execution: 5:35 p.m. - Mr. Mickey Cortez, Cheif Deputy Clerk, 11th Circuit Court of Appeals. 5:47 p.m. - Mr. Sydney McKenzie, Legal Advisor, Governor's Office. 5.50 p.m. - Mr. Richard Dugger, Superintendent, Flrida State Prison. 6:15 p.m. - Mr. Donald R. Hassfurder, Duty Officer, Dept. of Corrections. 6:20 p.m. - Mr. George Georgeiff, Attorney General's Office. 6:45 p.m. - Mr. Mark Menser, counsel for respondents.	ja
	*	Copies of the file (items 1-6) taken to the Airport Postal Office and forwarded via Express Mail (approx 7:45 p.m.) to: Mr. Mickey Cortez - 11th Circuit Court of Appeals. Mr. Christopher Vasil - Chief Deputy Clerk, U. S. Supreme Court, Washington D.C. *Per Mr. Mark Menser, counsel for respondents, copies of documents 1-6 were received this date from counsel for petitioner, by Federal Express.	ja
09-16-84	7	MOTION for Summary Denial of Petition for Writ of Habeas Corpus and RESPONSE thereto and MEMORANDUM of Law in Support Thereof, by Respondents. (2)	116-190 ja
	8	RESPONSE to Application for Stay of Execution, by Respondents. (4)	ja 191-201

(see page 2)

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DEATH PENALTY

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-170-Civ-Oc-16 DOCKET NO
AUBREY DENNIS ADAMS	LOUIE L. WAINWRIGHT, et al.	PAGE 2 OF ___ PAGES

DATE	NR.	PROCEEDINGS	
9-16-84	*	Counsel for all parties telephonically notified by Judge Moore's staff of the non-evidentiary hearing on Monday, September 17, 1984, at 3:30 p.m.	ja
9-17-84	9	ORDER GRANTING Leave to Proceed In Forma Pauperis (1). JHM s/9/17/84 (copies hand-delivered to counsel of record)	202 ja
	10	ORDER that leave to file an enlarged Petition for Writ of Habeas Corpus is GRANTED. (3) JHM s/9/17/84 (copies hand-delivered to counsel of record)	203 ja
	11	ORDER that petitioner's Motion to Admit Counsel Pro Hac Vice (6) is GRANTED. JHM s/9/17/84 (copies hand-delivered to counsel of record)	204 ja
	12	MOTION to Amend Petition for Writ of Habeas Corpus by a Person in State Custody, by petitioner.	205-210 ja
	*	RECEIVED proposed order (12).	ja
	*	Copies of documents 7-12 sent by Express Mail to the following: Mr. Mickey Cortez, Cheif Deputy Clerk, 11th Circuit Court of Appeals. Mr. Christopher Vasil, Chief Deputy Clerk, U. S. Supreme Court, Washington, D.C.	ja
	13	ORDER that petnr's Motion to Amend Petition (12) is GRANTED. JHM s/9/17/84 (counsel ntfd) (Amendment attached to Order).	211-212 ja
	*	STATE COURT PAPERS RECEIVED IN THE CASE OF AUBREY DENNIS ADAMS, JR., Death Penalty Case, on September 11, 1984. Ordered to be filed as Exhibits 1, 1a-27b, by Judge John H. Moore II:	ja
		(1) TRANSCRIPT of Hearing before Hon. William F. Edwards, Circuit Court for Marion County, Florida, on 8/23/78, Case No. 78-366.	
		(1a) TRANSCRIPT of Hearing in Open Court before the Honorable William F. Edwards, Circuit Court for Marion County, Florida, Case No. 78-366, held on August 23, 1978.	
		(2-9) TRANSCRIPT'S of Proceedings on a Jury Trial held before the Honorable William F. Edwards, Circuit Court for Lake County, Florida on 10/12/78, Case No. 78-574-CP-A-01, VOLUMES 1-8.	
		(10) PROCEEDINGS on Sentencing and Hearing on Motions before the Honorable William F. Edwards, in the Circuit Court, Lake County, Florida on 1/16/79.	
		(11) INITIAL BRIEF OF APPELLANT, on Appeal in the Supreme Court of Florida, Case No. 56-134.	

(see page 3)

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(Rev. 1/75)

DEATH PENALTY

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-170-Civ-Oc-
AUBREY DENNIS ADAMS	LOUIE L. WAINWRIGHT, et al.	DOCKET NO. ____
		PAGE 3 OF ____ P.

DATE	NR.	PROCEEDINGS
		(12) BRIEF OF THE APPELLEE, on Appeal in the Supreme Court of Florida, Case No. 56-134.
		(13) REPLY BRIEF of Appellant, on Appeal in the Supreme Court of Florida, Case No. 56-134.
		(14) 412 Southern Reporter, 2nd Series re: Aubrey Dennis Adams, Jr.
		(15) RECORD ON APPEAL to the Supreme Court of Florida from the Circuit Court for Marion County, Florida, Case No. 78-366-CF-A-01.
		(16) TRANSCRIPT of Proceedings re: Hearing held 9/7/84, (3.850) before the Hon. William F. Edwards.
		(17) PETITION for Writ of Habeas Corpus, Supreme Court of Florida.
		(18) APPENDIX to Petition for Writ of Habeas Corpus, Supreme Court of Florida.
		(19) RESPONSE to Petition for Writ of Habeas Corpus, Supreme Court of Florida.
		(20) APPELLANT'S BRIEF, in the Supreme Court of the State of Florida.
		(21) ANSWER BRIEF of Appellee.
		(22) MOTION by Appellee for Leave to File Enlarged Brief, Case No. 56-134.
		(23) APPLICATION FOR STAY OF EXECUTION and Points and Authorities in Support thereof, Case No. 56-134, Supreme Court of Florida.
		(24) RESPONSE by State to Motion for Stay of Execution.
		(25) SUPPLEMENTAL RECORD ON APPEAL, in the Supreme Court, Case No. 78-366-CF-A-1.
		(26) OPINION from the Supreme Court of the State of Florida re: "Accordingly, we affirm the order of the trial court DENYING Adam's Motion for Post-conviction relief. The motion for stay of execution is DENIED. Adam's Petition for Writ of Habeas Corpus is also DENIED".
		(27a and 27b) STATE'S EXHIBITS 16 and 17 from trial court, Ocala, Florida, marked for identification as (rm) and (uu), forwarded per Margene Roper, counsel for respondents, on 9/13/84.

(see page 4)

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-170-Civ-Oc-16 DOCKET NO
AUBREY DENNIS ADAMS	LOUIE L. WAINWRIGHT, ET AL.	PAGE 4 OF ___ PAGES

DATE	NR.	PROCEEDINGS	
9-18-84	14	ORDER: that the Clerk of this Court file the record of the State Court proceedings as part of the record in this cause. JHM s/9/18/84 (counsel ntfd)	213- ja
	15	OPINION AND ORDER: 1. The Petition for Writ of Habeas Corpus is DENIED. (2) 2. Petitioner's motion for stay of execution (4) is DENIED. 3. The Clerk of this Court shall enter judgment dismissing this action. JHM s/9/18/84 at 2:48 a.m. (counsel ntfd)	214-240 ja
	16	JUDGMENT: Pursuant to Order filed 9/18/84, the Petition for Writ of Habeas Corpus is DENIED, and Petitioner's motion for stay of execution is DENIED. This case isdismissed. clerk/9/18/84 (counsel ntfd) MR106/1425	241 ja
	17	APPLICATION for Certificate of Probable Cause and Certificate to Appeal In Forma Pauperis, by petitioner.	242-245 ja
	18	RESPONSE in Opposition to Motion for Certificate of Probable Cause and Memorandum of Law in Support (17), by respondents.	246-249 ja
	19	ORDER GRANTING Certificate of Probable Cause (17) and Leave to Appeal In Forma Pauperis. JHM s/9/18/84 (counsel ntfd)	250-251 ja
	20	NOTICE OF APPEAL of Opinion and Order (15) entered 9/18/84, filed by petitioner.	252-253 ja
	21	MOTION for Stay of Execution Pending Appeal to the Court of Appeals for the Eleventh Circuit, by petitioner.	254-256 ja
	22	ORDER: Petitioner's motion for stay pending appeal (21) is DENIED. JHM s/9/18/84 (counsel ntfd)	257 ja
	*	2:52 a.m. - 3:25 a.m. The following persons were telephonically notified of the Opinion and Order (15), Granting of the Certificate of Probable Cause and Application to proceed In Forma Pauperis: Ms. Margene Roper, counsel for respondents. Mr. Mickey Cortez, Cheif Deputy Clerk for the 11th Circuit Court of Appeals. Donna Scruggs, Secretary to Louie Wainwright, Dept. of Corrections. Mr. Kenneth Hart, counsel for petitioner. Mr. Richard Dugger, Supt. of Fla. State Prison. Mr. Art Wiedinger, Governor's Office.	ja

(see page 5)

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CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	84-170-Civ-Oc-16 DOCKET NO.
AUBREY DENNIS ADAMS	LOUIE L. WAINWRIGHT, et al.	PAGE 5 OF ___ PAGE

DATE	NR.	PROCEEDINGS	
09-18-84	*	Copies of documents 13-22 sent by Express Mail to Margene Roper, counsel for respondents; Philip Padavano and Kenneth Hart, counsel for petitioner.	ja
	*	RECORD ON APPEAL sent by Delta Dash to Court of Appeals. 1 volume of the Record, and 1 box of exhibits (1,1a-27b).	ja

I certify the foregoing to be a true
and correct copy of the original.
DONALD M. CHAMBLIN, Clerk
United States District Court
Middle District of Florida
By: Paula J. Goers
Deputy Clerk

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

SEP 17 3 29 PM '84

AUBREY DENNIS ADAMS,)
Petitioner,)
vs.) CIVIL ACTION NO. 84-170-CIV-OC-16
LOUIS L. WAINWRIGHT)
Respondent.)

ORDER ALLOWING AMENDMENT

On motion of Petitioner, AUBREY DENNIS ADAMS, for an order granting permission to amend his pleadings as shown in the proposed amendment attached hereto as Exhibit "A",

It is hereby ORDERED that Petitioner's motion to amend is hereby GRANTED.

DONE and ORDERED this 17 day of September, 1984.

JUDGE JOHN H. MOORE II
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
~~JACKSONVILLE~~ DIVISION
Ocala

AUBREY DENNIS ADAMS,)
Petitioner,)
vs.) CIVIL ACTION NO 84-170-CIV-OC-1
LOUIS L. WAINWRIGHT)
Respondent.)
)

AMENDMENT TO PETITION
FOR WRIT OF HABEAS CORPUS

G(1)(g) Trial Counsel Failed to Adequately Investigate, Develop, and Present Evidence in Mitigation in the Sentencing Phase of Petitioner's Trial

See Point E above for a discussion of certain psychological disorders of the Petitioner which should have been presented to the trial court during the sentencing phase of the trial in mitigation of Petitioner's sentence.

In addition, if the Petitioner is granted the evidentiary hearing to which he is entitled (See Point G(2)), the Petitioner will present evidence that, at the time of the crime, he was psychotic and paranoid; he had impaired judgment as a result of a mental disorder; and was unable to control his actions or to conform them to the requirements of the law. Furthermore, Petitioner will show that this evidence should have been discovered and presented to the trial court during the sentencing phase of his trial.

EXHIBIT A

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

Sep 18 2 ns AM '84

J. [illegible], FLORIDA

AUBREY DENNIS ADAMS, Jr.,

Petitioner,

vs. No. 84-170-Civ-Oc-16

LOUIE L. WAINWRIGHT, etc., et al.,

Respondents.

OPINION AND ORDER

This cause is before this Court on the petition for writ of habeas corpus filed on Friday, September 14, 1984, at 5:13 p.m., by AUBREY DENNIS ADAMS, JR., a death-row inmate at Florida State Prison. Respondents filed their response on Sunday, September 16, 1984, at 11:18 a.m. A hearing on this petition was held on Monday, September 17, 1984, commencing at 3:30 p.m. After a careful and thorough review of the record in this cause, and after hearing argument of counsel for the respective parties, this Court is of the opinion that the petition for writ of habeas corpus should be denied.

Procedural History

On October 20, 1978, following indictment and jury trial, petitioner was convicted of the first-degree murder of Trisa Gail

Thornley in the Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida. On October 27, 1978, the jury rendered an advisory sentence recommending death by electrocution, and on January 16, 1979, the trial judge imposed the sentence of death by electrocution. The Supreme Court of Florida affirmed Petitioner's conviction and sentence on direct appeal in Adams v. State, 412 So.2d 850 (Fla. 1982). The United States Supreme Court denied certiorari in Adams v. Florida, 459 U.S. 882 (1982).

On August 21, 1984, the Governor of the State of Florida signed a death warrant ordering Petitioner's execution during the week commencing September 13, 1984. Execution is scheduled for September 19, 1984, at 7:00 a.m. On September 5, 1984, the Petitioner filed a motion for post-conviction relief, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, challenging the validity of his conviction and sentence. Upon denial of that motion, Petitioner filed his appeal to the Florida Supreme Court on September 7, 1984. He also filed a petition for writ of habeas corpus before the Florida Supreme Court, together with an application for a stay of execution. On September 11, 1984, in a combined opinion, the Florida Supreme Court affirmed the denial of Petitioner's post-conviction motion, denied the petition for writ of habeas corpus, and denied petitioner's motion for stay of execution.

Grounds for Relief

The Petitioner raises a multitude of issues in support of his petition, each of which will be resolved seriatim in the order in which they are presented in the petition.

Petitioner's first contention is that his right to a fair trial and to due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution was violated because the conviction and sentence were based upon a statute declared unconstitutional prior to the date of his offense. In essence, the Petitioner contests the trial court's instructions to the jury on first degree murder. In defining murder and its degrees, the trial court advised the jury with respect to felony murder as follows:

> The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree even though there is no premeditated design or intent to kill.

Because the abominable and detestable crime against nature was declared unconstitutional and void for vagueness in Franklin v. State, 257 So.2d 21 (Fla. 1971), it is asserted that the trial court erred by including this crime in its felony murder charge.

In Stromberg v. California, 283 U.S. 359 (1931), the United States Supreme Court held that "a general verdict must be set aside if the jury was instructed that it could rely on any of two

or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." Zant v. Stephens, 103 S.Ct. 2733 (1983). As the Court clarified in Zant, "[c]ases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested." Id. at 2745 (emphasis added).

Upon an exhaustive review of the record in this cause, this Court is convinced that the jury's verdict of first degree murder was undoubtedly based upon a finding of premeditated murder. Initially, the Court notes that the Florida Supreme Court, on direct review of the conviction and sentence, held that the evidence was sufficient to show a premeditated design on the part of the Petitioner to murder the victim. 412 So.2d at 852. It would serve no purpose here to reiterate the facts of this case which are clearly enunciated in the Florida Supreme Court's opinion. This Court's independent review of the record reveals that the Petitioner was indicted on a charge of premeditated murder and that the indictment was silent as to a felony murder. This indictment was submitted to the jury during its deliberations. Although it is clear in Florida that such an indictment is sufficient to support a prosecution on a felony murder theory, the record clearly shows that this theory was not advanced in the trial of this case. The victim was found with rope wrapped around her neck seven times, the unchallenged medical testimony was that strangulation was the probable cause of death, and both

counsel for the State and the Petitioner focused exclusively on premeditation in their final arguments to the jury.

Even more convincingly, the trial court's instructions to the jury did not charge the jury to find a verdict based upon a theory of felony murder. Rather, the trial court merely provided the jury with the then statutory definitions of the various degrees of murder. The judge's actual charge to the jury is contained in his summarization following the definitions, as follows:

> To summarize: The essential elements of an unlawful homicide which must be proved beyond a reasonable doubt in this case before there can be a conviction of any offense are as follows: (1), that Trisa Gail Thornley is, in fact, dead; (2), that the killing was wrongful and by the means stated in the indictment; (3), that Trisa Gail Thornley was killed by the defendant; and, (4), that the killing was neither justifiable or excusable homicide.
>
> If the elements are established then it will be necessary for you to determine the degree of the unlawful homicide.
>
> If the defendant, in killing the deceased, acted from a premeditated design to effect the death of the deceased, or some other human being, he should be found guilty of murder in the first degree.
>
> If the killing was not from a premeditated design to effect the death of any human being, but was in the perpetration of an act imminently dangerous to another, evincing a depraved mind, regardless of human life, the defendant should be found guilty of murder in the second degree.
>
> If the killing took place while the defendant was engaged in the commission of a felony other than arson, rape, robbery, burglary, the abominable and detestable crime

> against nature or kidnapping, the defendant should be found guilty of murder in the third degree.
>
> If the killing was by the act, procurement or culpable negligence of the defendant and was not murder in any degree or justifiable or excusable homicide, the defendant should be found guilty of manslaughter.
>
> Of course, if any one of the essential elements of any unlawful homicide has not been proved beyond a reasonable doubt, the defendant should be found not guilty.

Thus, the case was not submitted to the jury on a felony murder theory, and following these instructions, the jury would not have returned a verdict of murder in the first degree unless it found the murder to be a premeditated one. Accordingly, the Stromberg rule is inapplicable because this reviewing Court is certain that the jury's verdict rested upon a finding of premeditated murder.

Petitioner's next claim is based upon the trial court's failure to instruct the jury on the elements of the underlying felony murder offenses as discussed above. Although this ground for relief may be subject to a procedural default bar, pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977), the Florida Supreme Court reviewed this issue on the merits and, therefore, the claim is not barred from review by Florida's contemporaneous objection rule. Engle v. Isaac, 456 U.S. 107, 135 n.44 (1982).

This Court has limited authority to review jury instructions in a habeas corpus proceeding arising out of a state court criminal trial. As the United States Supreme Court noted in

Henderson v. Kibbe, 431 U.S. 145 (1977), "[t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." Id. at 154. The test is "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' not merely whether 'the instruction is undesirable, erroneous, or even universally condemned.'" Id. quoting Cupp v. Naughten, 414 U.S. 141, 146-47 (1973). Interestingly, the Supreme Court emphasized that an incomplete instruction is less likely to be prejudicial than a misstatement of the law. 431 U.S. at 155.

This Court finds that the failure to instruct the jury on the underlying elements of sexual battery and kidnapping did not constitute an egregious error that infected the entire trial so profoundly that Petitioner's due process rights were violated. "Even if we were to make the unlikely assumption that the jury might have reached a different verdict pursuant to an additional instruction, that possibility is too speculative to justify the conclusion that constitutional error was committed." 431 U.S. at 157.

Because the allegedly inadequate jury instruction was not constitutionally infirm, Stromberg does not require reversal of Petitioner's conviction. Even had the jury instruction been so egregious as to violate due process, this Court has already

determined from a review of the record that the jury verdict rested upon a finding of premeditated murder. This second claim is thus also without merit.

Petitioner's next claim is that the death sentence constitutes excessive and disproportionate punishment in violation of the Eighth and Fourteenth Amendments in light of the overwhelming mitigating circumstances in this case which Petitioner submits outweigh the aggravating circumstances.

The record discloses that the trial court found the existence of the following three mitigating circumstances:

> 1. The Petitioner had no significant history of prior criminal activity;
>
> 2. The capital felony was committed while the Petitioner was under the influence of extreme mental or emotional disturbance; and
>
> 3. The age of the Petitioner, twenty, was of significance.

In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court declared constitutional on its face Florida's capital sentencing procedure, including its provision for weighing of aggravating and mitigating circumstances. The Court held:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authorities' discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judge and jury by the Florida Statute are sufficiently clear and precise to enable the various aggravating

> circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.
>
> Finally, the Florida Statute has a provision designed to assure that the death penalty will not be imposed on a capriciously-selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to insure that similar results are reached in similar cases.

Id. at 258. (Footnote omitted).

On direct appeal of Petitioner's sentencing and conviction, the Florida Supreme Court on its own independent review of the record held that the trial court exercised reasoned judgment in imposing the death sentence and that the sentence comported with that of other capital cases. 412 So.2d at 857. This Court is satisfied on its own review and examination of the record that the Florida Supreme Court's review of Petitioner's death sentence was not arbitrary and capricious or in disaccord with constitutional principles relating to sentencing in capital cases. Ford v. Strickland, 696 F.2d 804, 819 (11th Cir. 1983). Accordingly, because the state courts acted pursuant to a properly drawn statute with constitutionally adequate standards to guide discretion, Petitioner's claim is dismissed as non-meritorious.

Petitioner's fourth claim for relief alleges that the trial judge applied Section 921.141(5)(e) of the Florida Statutes in an arbitrary fashion in violation of his Eighth and Fourteenth Amendment rights. At the sentencing phase of the trial, the

trial judge determined that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. This finding was based upon evidence that the defendant kidnapped and raped the victim, that the victim knew and could have identified defendant, that the victim was found dead, which prevented any testimony on her part concerning the kidnapping and rape, that the defendant encased the body in plastic garbage bags and tied it with rope, and that he disposed of the body in a desolate area. Petitioner's contention is that if these bases are sufficient to support a finding of this aggravating factor, then the aggravating factor was arbitrarily applied because that factor would be found in every murder where a body is hidden or concealed.

The United States Supreme Court has held that an aggravating factor may be unconstitutional if applied in an arbitrary manner and if there is "'no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.'" Gregg v. Georgia, 428 U.S. 153, 188 (1976), quoting Furman v. Georgia, 408 U.S. 238, 313 (1972). (White, J., concurring). Petitioner's claim that the aggravating factor was arbitrarily applied in this case is nonetheless clearly without merit. The aggravating factor of avoiding arrest was not found in this case simply because the victim's body was hidden; rather, the evidence supports the finding that death was preceded by kidnapping and rape and that the victim was murdered

to prevent defendant's discovery and conviction for these felonies.

Petitioner's fifth claim is that he was deprived of due process under the Sixth and Fourteenth Amendments because he was tried before a jury for first degree murder while he was incompetent to stand trial.

Petitioner first asserted this claim on September 5, 1984, in his motion for post-conviction relief to vacate the judgment and sentence. The state court summarily denied Petitioner's claim on the basis that competency is a matter which should have been presented on direct appeal and, therefore, Petitioner was procedurally barred from raising this claim in a collateral proceeding. He argues that this Court should simply disregard this procedural bar and address the merits of Petitioner's claim since, under Pate v. Robinson, 383 U.S. 375 (1966), a defendant's competency to stand trial is not an issue that can be waived. However, this Court finds that Pate is not controlling because the Court found ample evidence in that case that Robinson's sanity was very much at issue during the trial. The Court thus concluded that Robinson was constitutionally entitled to receive a hearing on the issue of his competency. As discussed below, the record in this case reveals that while Petitioner's sanity might have been initially considered as a possible defense, Petitioner's trial counsel subsequently discarded it. Nonetheless, due to the nature and import of this habeas petition, the possibility that Petitioner's alleged incompetency to stand trial

involves fundamental constitutional error to which procedural default does not apply, and because the competency claim is subsequently raised in Petitioner's effective assistance of counsel arguments, the Court now reviews Petitioner's competency claim on the merits.

The test for competence to stand trial is whether the defendant has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and whether the defendant possesses a rational and factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402 (1960). Before a federal habeas court will entertain a claim grounded on incompetency at trial, it requires Petitioner to prove by clear and convincing evidence sufficient facts that positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to Petitioner's competency at trial. Pride v. Estelle, 649 F.2d 324 (5th Cir. 1981). As recently stated in Johnson v. Estelle, 704 F.2d 232, 237-38 (5th Cir. 1983), the sole issue is whether the habeas petitioner had the present mental ability to meaningfully participate in his defense. Facts which would raise a legitimate doubt include: (1) a history of mental illness, and (2) substantial evidence of mental incompetence at or near the time of trial supported by the opinion of qualified physicians and the testimony of laymen. Id. at 238.

Petitioner raises two grounds to support his argument that a legitimate doubt exists that Petitioner was incompetent to stand

trial. First, Petitioner contends that trial counsel specifically told the State trial court that Petitioner was unable to assist him at trial. Second, Petitioner refers to a post-conviction evaluation of Petitioner by Sandra Gilels, Ph.D., which demonstrates that Petitioner has mental disorders that render him incapable of recalling traumatic experiences.

This Court finds, however, that Petitioner has not proven by clear and convincing evidence facts to raise a legitimate doubt of Petitioner's competence at trial. The record shows that on April 11, 1978, Petitioner's attorney filed a motion for an order directing the Sheriff to allow admission of psychiatrists into Marion County Jail for purposes of examining Defendant and possibly initiating an insanity defense. This motion was granted on April 14, 1978. On April 17, 1978, a hearing was held wherein the issue of Petitioner's competency was raised. Petitioner's trial counsel expressly stated that he knew of no evidence at that time to suggest Petitioner was incompetent, and that it would therefore be highly improper for the Court to order a competency examination. Trial counsel made it clear that the psychiatric examination was instigated by the defense for purposes other than to challenge Petitioner's competency. Petitioner's argument that trial counsel specifically told the State trial court that Petitioner was unable to assist him at trial thus appears self-serving because it is (1) found in the record as part of the presentence investigation report ordered by the

Court after Petitioner's conviction,[1] and (2) stands in contrast to the colloquy during pretrial when trial counsel was formulating trial strategy.

Dr. Gilel's psychological evaluation of Petitioner does not prove by clear and convincing evidence the real and legitimate doubt required by Pride v. Estelle, supra. As the Florida Supreme Court stated in its denial of Petitioner's motion for post-conviction relief, Dr. Gilel's testimony is a diagnosis of Petitioner's present condition and is not evidence that he suffered from this disorder at the time of trial.

This Court's review of the record evinces nothing to refute the fact that Petitioner had a present ability to consult with his lawyer with a reasonable degree of rational understanding and that he possessed a rational and factual understanding of the proceedings. Dusky v. United States, 362 U.S. 402 (1960). A federal habeas court must not overturn a state court's factual conclusions unless it determines that these conclusions are not fairly supported by the record. Maggio v. Fulford, 103 S.Ct. 2261 (1983).

To summarize, Petitioner waived his competency defense on direct appeal and the record does not support a finding that Petitioner was constitutionally entitled to a competency hearing.

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[1] Trial counsel's actual statement was: "Prior and during the trial, Dennis Adams could not remember and therefore could not provide information concerning the killing that would assist with his defense." This is significantly different from a contention that the Petitioner did not have a present ability to consult with his lawyer with a reasonable degree of rational understanding.

Assuming, without deciding, that Petitioner alleges a claim involving fundamental error to which procedural default does not apply, Petitioner has not demonstrated the requisite proof under Pride v. Estelle to assert a competency claim on petition for habeas corpus.

Petitioner's sixth claim for relief asserts that the admission of two gruesome photographs of the victim rendered his trial fundamentally unfair and, therefore, denied his Sixth and Fourteenth Amendment rights. The first photograph, State's Exhibit No. 16, is a photograph showing the rope found around the victim's neck when the body was discovered. The second photograph, State's Exhibit No. 17, shows the tying of the victim's hands and the tape that was found on the hands.

Although a Court considering a petition for a writ of habeas corpus does not sit to review questions solely evidentiary in nature, this Court is nevertheless obligated to examine the constitutional implications of the admission of these photographs. Osborne v. Wainwright, 720 F.2d 1237 (11th Cir. 1983). The questions before the Court are whether these photographs were erroneously admitted and, if so, whether the error was so significant as to deny fundamental fairness to the petitioner. The evidentiary mistake must be "material in the sense of a crucial, critical, highly significant factor." Corpus v. Beto, 469 F.2d 953, 956 (5th Cir. 1972).

Petitioner argues that the photo showing rope around the victim's neck is irrelevant and cumulative. The State's theory

that the murder was premeditated hinged in part on a finding that death occurred by strangulation. As noted previously herein, the unchallenged medical testimony at trial indicated that strangulation was the probable cause of death. This photograph was therefore relevant to show whether death occurred by strangulation and, consequently, whether defendant was guilty of premeditated murder. In addition, this evidence was not cumulative, since defense counsel emphasized on cross-examination that the expert witnesses could not be absolutely certain that strangulation was the cause of death.

The second photograph, showing the tying of the victim's hands, was relevant to show the cause and circumstances of death. Although testimony establishing that tape was found on the victim's hands was not challenged by the defense, this photograph was not unduly cumulative, and the State trial judge did not err in admitting it. Certainly, no error was committed of sufficient magnitude as to significantly affect the fairness of Petitioner's trial. See Adams v. State, 412 So.2d 850, 853-854 (Fla. 1982).

Petitioner's final claim is that he was denied his constitutional right to the effective assistance of counsel at trial and on appeal. This claim involves several subparts. Petitioner alleges his trial counsel rendered ineffective assistance in failing to raise seven issues at trial. He also claims his appellate counsel rendered ineffective assistance in failing to raise and effectively argue five of the same seven issues erroneously omitted at trial. Finally, he argues that appellate counsel's

failure to object to the felony murder instructions denied his right to a full and meaningful direct appeal.

In the recent case of Strickland v. Washington, 104 S.Ct. 2052 (1984), the United States Supreme Court articulated the proper standards for judging Petitioner's contention that his conviction or death sentence must be set aside because he was denied his constitutional right to effective assistance of counsel. First, Petitioner must show that counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, Petitioner must show that the deficient performance prejudiced the defense; that is, that the result of the proceeding probably would have been different had counsel not made the unprofessional errors. As the Supreme Court noted, the Court need not determine whether counsel's performance was deficient when it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice. Id. at 2069-70.

The law is well established that a defendant has the right to effective assistance of counsel on appeal. Anders v. California, 386 U.S. 738 (1967). Because five of the issues allegedly erroneously omitted on appeal are identical to those allegedly erroneously omitted at trial, these five issues will be analyzed first.

Petitioner first contends that both trial and appellate counsel erred in failing to object to a general verdict of guilty that was based upon either a finding of premeditated murder or

felony murder. Petitioner asserts that an objection based on Enmund v. Florida, 458 U.S. 782 (1982), would have been appropriate because the verdict could have been based upon felony murder even though the jury did not specifically find Petitioner deliberately killed the victim. Again, however, this Court reiterates its determination that the jury verdict rested on a finding of premeditated murder. Moreover, Enmund held only that one who aids and abets a planned robbery cannot constitutionally be sentenced to death when he personally did not kill, attempt to kill, or have any intention of participating in or facilitating a murder. The Eleventh Circuit recently held that the death penalty is not disproportionate to the culpability of one who, acting alone, personally kills his victim. Adams v. Wainwright, 709 F.2d 1443, 1447 (11th Cir. 1983). Thus, even if Petitioner's trial and appellate counsel had objected to the absence of a specific finding that Adams deliberately killed his victim, this objection would have been without merit. Petitioner, therefore, cannot satisfy the second standard set forth in Strickland, that counsels' alleged error prejudiced the defense.

Second, Petitioner alleges his trial and appellate counsel erred in failing to object to jury instructions which allowed the jury to consider all aggravating circumstances enumerated in the death penalty statute, even though the evidence did not support several of these circumstances. Petitioner argues these instructions did not channel consideration of aggravating circumstances as mandated by the United States Supreme Court in

Godfrey v. Georgia, 446 U.S. 420 (1981), and Proffitt v. Florida, 428 U.S. 242 (1976).

The trial court's instructions to the jury tracked Florida's death penalty statute, Fla. Stat. § 921.141(5)(supp. 1976-1977). A review of the sentencing phase of the record additionally reveals that the trial judge instructed the jury to consider only the evidence presented. He then instructed the jury on what proof constituted an aggravating circumstance and that "[e]vidence intending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstance at the time of the offense is to be wholly disregarded."

In light of these instructions, the Court finds Petitioner's contention to be without merit. There is no indication whatsoever that the jury's sentencing discretion was unconstitutionally broadened. The jury was directed to consider all of the evidence in the case in reaching its decision and was clearly instructed on the level of proof required to establish aggravating circumstances. Hence, counsels' failure to object to the instructions on aggravating circumstances did not constitute ineffective assistance of counsel, since such an objection would have been without merit.

Petitioner's third contention is that his trial and appellate counsel erroneously failed to object to jury instructions that required the death penalty advisory sentence to be agreed upon by seven or more jurors. The standard jury

instruction for Florida capital cases at the time of trial, between 1975 and 1981, provided that the jury be instructed that "[t]he law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment." Florida Standard Jury Instructions in Criminal Cases, 80 (1975). The instruction has been changed to direct that six or more votes is sufficient to recommend life imprisonment, see Florida Standard Jury Instructions in Criminal Cases, 82 (1981), but the instructions still charge the jury to return its recommendation "when seven or more are in agreement as to what sentence should be recommended to the court." Id. Moreover, while the instruction has been altered somewhat since Petitioner's trial, the statute upon which that instruction was based has not been changed since it was upheld by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976).

Petitioner asserts that Rose v. State, 425 So.2d 521 (Fla. 1982), established that the standard jury instruction given in Petitioner's trial was an erroneous statement of the law and that this erroneous instruction may have caused a juror to surrender an honest conviction on the belief that his or her vote was necessary to reach a verdict. However, Petitioner misconstrues the holding of Rose. That case merely stands for the proposition that an "Allen charge" should not be given to coerce the jury into reaching a majority verdict when the jury reported to the judge that it was "tied six to six, and no one will change

their mind at the moment." Rose, 425 So.2d at 525. Since evidence of a jury deadlock is entirely lacking in this case, Rose does not apply.

Because the trial judge charged the jury with the standard jury instruction in effect at the time of the trial, and because both the previous and current jury instructions track the statute which has been upheld by the United States Supreme Court, counsels' failure to object to these instructions did not prejudice the defense or constitute a professionally unreasonable error. Thus, Petitioner has not established that either the performance or the prejudice standard of Strickland is satisfied.

Fourth, Petitioner claims that trial and appellate counsels' failure to object to the jury instructions' inadequate explanation of the nature and function of mitigating circumstances constituted ineffective assistance of counsel. It is well-settled that jurors must receive instructions that adequately guide their consideration of mitigating circumstances. See Tucker v. Zant, 724 F.2d 882 (11th Cir. 1984). The record in this case reveals that the trial court instructed the jury to consider mitigating evidence, defined mitigating factors as factors which point toward recommending life imprisonment, and explained that no limitation exists on the type of mitigating factors that may be considered, that mitigating circumstances should be weighed against aggravating circumstances, that this balancing process should not involve merely counting the

mitigating and aggravating circumstances but should involve the exercise of reasoned judgment, and that life imprisonment should be recommended if the jury did not find that sufficient aggravating circumstances existed. The instructions clearly contained adequate guidelines to inform the jurors of their duties involved in rendering their advisory sentence. Any objection based on this ground would therefore have been without merit, and Petitioner cannot establish sufficient prejudice to the defense to satisfy the Strickland test for ineffective assistance of counsel.

Petitioner's fifth claim is that trial and appellate counsel should have objected to the trial judge's instruction on all lesser degrees of homicide because there was no evidentiary basis for these lesser offenses. At the time of trial, Florida law required jury instructions in first degree murder cases to include charges on all degrees of homicide, regardless of the evidentiary basis for these offenses. Petitioner alleges that instructions on lesser included offenses, regardless of the existence of an evidentiary basis for these offenses, led to "jury pardons" which resulted in arbitrary sentences in capital cases. The "pool" of capital cases against which Petitioner's case has been compared is thus allegedly infected with arbitrariness in violation of Godfrey v. Georgia, 446 U.S. 420 (1981).

This Court declines to strike Florida's entire capital sentence scheme as unconstitutional on the speculative ground

that juries in other cases may have disregarded the trial judge's instructions to base their verdict on the evidence before them. Jurors are presumed to follow the law as they are instructed. In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court specifically upheld the constitutionality of the Florida law requiring the jury's consideration of lesser included offenses. As the Court explained in Gregg v. Georgia, 428 U.S. 153 (1976), "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Id. at 199. This claim, like the preceding four claims, is thus wholly without merit. Trial and appellate counsels' failure to raise this objection cannot constitute ineffective assistance of counsel because the defense was in no way prejudiced by the omission, as required by Strickland.

Petitioner additionally asserts that trial counsel erred in failing to investigate and present evidence that Petitioner was incompetent to stand trial and/or to participate in the sentencing phase of trial. The record in this case reflects that trial counsel provided the reasonably effective assistance guaranteed by the Sixth Amendment. As noted in Strickland, "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." 104 S.Ct. at 2065. The presentence investigation report indicates that trial counsel had

known the defendant for some time. Moreover, as noted previously herein, trial counsel specifically advised the Court that a competency hearing would be inappropriate under Florida law since no evidence had been submitted to suggest that defendant was not presently competent to stand trial. Finally, a psychiatrist hired by the defense subsequently examined the defendant, albeit concerning defendant's sanity at the time of the commission of the offense, and this psychiatrist did not suggest defendant was incompetent to stand trial. The record thus reflects that, under the circumstances, counsel's decision not to pursue the competency issue could well be considered sound trial strategy. See Strickland, 104 S.Ct. at 2065-66. Applying the requisite heavy measure of deference to counsel's judgments, this Court does not find counsel's failure to pursue the competency claim was professionally unreasonable.

Finally, Petitioner claims that appellate counsel erred in failing to object to the jury instructions that charged the jury it could find defendant guilty of first-degree murder for crimes which do not exist and that failed to instruct on the elements of the underlying felonies. This Court dismissed these claims on the merits at the outset of this opinion and, thus, the outcome of Petitioner's case would not have been any different had appellate counsel objected to the instructions on these grounds.

In sum, then, all of the alleged errors of trial and appellate counsel must fail under the Strickland test, and

Petitioner has not been denied his Sixth and Fourteenth Amendment right to effective assistance of counsel.

Petitioner's last contention is that he is entitled to an evidentiary hearing on the claim that he was deprived of effective assistance of counsel at trial and at sentencing because trial counsel failed to investigate, develop and present evidence of incompetence.

In Townsend v. Sain, 372 U.S. 293 (1963), the Supreme Court held that an evidentiary hearing is mandatory when a habeas petitioner has not received a state court hearing and: (1) he alleges facts which, if proved, would entitle him to relief, and (2) the record reveals a genuine factual dispute as to these alleged facts. The Court specifically enumerated six circumstances where a federal habeas court must grant an evidentiary hearing to a habeas petitioner. Petitioner here claims that two of those circumstances are present: (1) the State factfinding procedures were not adequate to afford a full and fair hearing; and (2) the State trier of fact did not afford the habeas applicant a full and fair fact hearing.

The Court finds that Petitioner has not received a meaningful State court hearing on the issue of counsel's effectiveness and that ineffective assistance of counsel, if established, would warrant reversal of Petitioner's conviction and sentence. However, the record in this case does not reveal a genuine factual dispute concerning counsel's effectiveness, as required by the Townsend test for whether an evidentiary hearing is warranted.

As noted previously herein, trial counsel's decision not to pursue the issue of defendant's competency to stand trial was clearly professionally reasonable under the circumstances. Petitioner's claim for an evidentiary hearing on this issue is therefore denied.

Petitioner has amended the petition to further allege that trial counsel was ineffective for failing to adequately investigate, develop and present evidence in mitigation in the sentencing phase of his trial. Petitioner's contention is that evidence of his mental disorder should have been presented during this phase.

The record reveals that Petitioner's trial counsel put on the stand Dr. Sullwold and Petitioner's former wife and parents, and all testified in relation to Petitioner's mental state and emotional disturbance. The trial court, at the close of the sentencing hearing, did find as a mitigating circumstance that the capital felony was committed while Petitioner was under the influence of extreme mental or emotional disturbance. Additional mitigating circumstances relating to Petitioner's age and lack of prior criminal activity were also argued and established.

This Court is convinced that the test of Strickland for reasonably effective assistance as guaranteed by the Sixth Amendment is satisfied.

Having considered all issues raised by the Petitioner and having determined that none is sufficient to warrant this Court's issuance of its writ of habeas corpus, it is accordingly

ORDERED and ADJUDGED as follows:

1. That the Petition for Writ of Habeas Corpus filed by AUBREY DENNIS ADAMS on September 14, 1984 be and the same is hereby DENIED;

2. Petitioner's motion for stay of execution be and the same is hereby DENIED; and

3. The Clerk of this Court shall enter judgment dismissing this action.

DONE and ORDERED in Chambers at Jacksonville, Florida this 18 day of September, 1984 at 2:48 A.M. o'clock.

Wm. H. Moore II
UNITED STATES DISTRICT JUDGE

Copies to:

All counsel of record

I certify the foregoing to be a true and correct copy of the original.
DONALD M. CIERAMOND, Clerk
United States District Court
Middle District of Florida
By: Dargell W. Lewson
Deputy Clerk

Latimer, 511 F.2d 498, 503 (10th Cir.1975). The court sustained the defense's objection. Devous now contends that this was not enough, that the court should have granted a mistrial *sua sponte*. We disagree. Taken in context, the prosecutor was replying to the defense's insinuation in closing argument that Velikaneye should not have been given immunity, R.Supp. Vol. III at 536, by explaining that she had been given immunity because there was sufficient corroborating evidence to support what she was saying. *Cf. United States v. Young*, *supra*. The prosecutor's remarks about what he believed were on the border. Defense counsel's objection to those remarks was sustained. The trial court's action was proper and sufficient to avoid prejudice to the defendant.

[9] Devous contends that the court's instructions to the jury were confusing and incomplete, in that the court did not instruct the jury that the defendant's distribution of Demerol was "outside the course of his professional practice." This contention is incorrect; the court did instruct on this element by reference to the indictment, the full text of which was read to the jury as part of the instructions. R.Supp. Vol. IV at 551. Furthermore, the instructions, although complex, were not unduly confusing. We hold that the instructions were complete and adequately covered each element of the crimes charged.

[10, 11] Devous also contends that the evidence was insufficient to convict him on any of the three counts and that the trial court therefore erred in failing to grant his motions for acquittal. The substance of this contention is that the prosecution did not establish that the Demerol involved was not being used for legitimate medical purposes, or that it had been obtained fraudulently. We disagree. There was ample evidence presented that the Demerol was being used for recreational purposes, and that the final purchase of 40 bottles was effected through a false representation that the drugs were needed for a visiting doctor from Salt Lake City.

AFFIRMED.

Aubrey Dennis ADAMS, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, and Jim Smith, Respondents-Appellees.

No. 84-3646.

United States Court of Appeals, Eleventh Circuit.

June 17, 1985.

Habeas corpus petitioner appealed from an order of the United States District Court for the Middle District of Florida, John H. Moore, II, J., denying his petition. The Court of Appeals, Johnson, Circuit Judge, held that: (1) procedural default rule would not operate to preclude petitioner, who failed to request a competency hearing at trial or pursue a claim of incompetency on direct appeal, from pursuing claim of mental incompetency in federal habeas corpus proceeding; (2) petitioner presented insufficient evidence of mental incompetence at time of trial and sentencing to warrant evidentiary hearing; (3) record reflected certainty that conviction was for premeditated murder, and not felony-murder, which was not alleged but was referred to early in instructions as part of what were, in essence, statutory definitions; (4) failure to instruct as to elements of underlying felonies after instructing on felony-murder was not so prejudicial that the penalty ultimately imposed violated petitioner's due process rights; (5) trial court was not precluded from finding aggravating factor of murder committed for purpose of avoiding arrest by also finding as an aggravating factor that murder was committed during commission of or attempt to commit rape or kidnapping; and (6) none of claims of ineffective assistance of counsel warranted habeas corpus relief.

Affirmed.

1. Habeas Corpus ⇐45.3(1.40)

Procedural default rule would not operate to preclude defendant who failed to

request a competency hearing at trial or pursue a claim of incompetency on direct appeal from pursuing claim of mental incompetency in federal habeas corpus proceeding.

2. Mental Health ⇐434

Legal test for mental competency is whether, at time of trial and sentencing, defendant had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether defendant had a rational as well as factual understanding of proceedings against him.

3. Constitutional Law ⇐268.2(2)

As a matter of procedural due process, a criminal defendant is entitled to an evidentiary hearing on claim of mental incompetency if he presents clear and convincing evidence to create a real, substantial and legitimate doubt as to his mental capacity to meaningfully participate and cooperate with counsel.

4. Habeas Corpus ⇐85.5(2)

Failure to raise mental competency issue during trial or sentencing was persuasive evidence that habeas petitioner's mental competence was not in doubt and, therefore, that he was not entitled to an evidentiary hearing.

5. Criminal Law ⇐625

Defense attorney's statement in presentencing report to effect that habeas petitioner was unable to recall details of killing did not serve to raise a real, substantial, and legitimate doubt as to petitioner's mental competency to stand trial which would entitle him to an evidentiary hearing, since it would be possible for a defendant to have no recall of his involvement in a crime and yet fairly understand proceedings against him and cooperate meaningfully with his defense.

6. Habeas Corpus ⇐90.2(5)

Recent psychological evaluation diagnosing habeas corpus petitioner as suffering from catathymic amnesia failed to raise real, substantial, and legitimate doubt as to petitioner's competency to stand trial and be sentenced, and thus did not entitle petitioner to an evidentiary hearing, since the new psychological evaluation reflected only petitioner's present condition and shed little light on his condition at time of trial and sentencing.

7. Homicide ⇐345

Record reflected certainty that conviction on general jury verdict simply finding defendant guilty of first-degree murder was for premeditated murder, and not for felony-murder, which was never alleged but was referred to early in instructions as part of what were, in essence, statutory definitions.

8. Homicide ⇐340(4)

Where record reflected certainty that conviction was for premeditated murder and not felony-murder, instruction that was incomplete in failing to define elements of underlying felonies following instruction on felony-murder did not deprive defendant of his right to have a fully informed jury decide guilt or innocence.

9. Constitutional Law ⇐270(1)

Jury instruction at sentencing phase of capital trial that was incomplete for failure to define elements of felonies listed as possible aggravating factors to be considered in reaching an advisory verdict did not so infect entire sentencing proceeding that penalty ultimately imposed violated defendant's due process rights.

10. Criminal Law ⇐992

Under Florida law, a jury's advisory verdict recommending life imprisonment in a capital prosecution establishes an important set of parameters beyond which trial judge may exercise his discretion in reaching a sentence of death only if facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ.

11. Homicide ⇐354

Where underlying felony of kidnapping involved transportation of victim from one location to another and entailed commission of deliberate acts to avoid detection that resulted in victim's death, trial court was not precluded from finding as an aggravating factor that defendant had killed victim

in order to avoid or prevent his arrest by also finding as an aggravating factor that victim was killed during commission of kidnapping.

12. Habeas Corpus ⇐25.1(6)

None of petitioner's claims of ineffective assistance of counsel, including, inter alia, failure to adequately investigate competency to stand trial or be sentenced, failure to object to trial instruction on lesser degrees of homicide for which no evidence had been presented, failure to present in mitigation evidence of mental condition at time of murder and failure to object to sentencing instructions, involved both professional conduct that was unreasonable under circumstances and reasonable probability that, but for challenged conduct, result would have been different, warranting denial of habeas corpus relief. U.S.C.A. Const.Amend. 6.

Kenneth R. Hart, Timothy B. Elliott, Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, Fla., for petitioner-appellant.

Margene A. Roper, Asst. Atty. Gen., Port Orange, Fla., for respondents-appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY, FAY and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

Petitioner, Aubrey Dennis Adams, was convicted of first degree murder in a Florida court in 1978. Following the jury's recommendation, the trial judge imposed the death sentence. Direct appeals proved unsuccessful, *Adams v. State*, 412 So.2d 850 (Fla.), *cert. denied*, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982), as have subsequent petitions in state court seeking post-conviction and habeas corpus relief. *Adams v. State*, 456 So.2d 888 (Fla.1984). This is an appeal from the district court's denial of the petitioner's federal habeas petition. *Adams v. Wainwright*, No. 84-170-Civ-Oc-16 (M.D.Fla. Sept. 18, 1984). We affirm.

I. FACTS

In March 1978, the body of an eight year old girl was discovered in a remote wooded area near Ocala, Florida. The petitioner's conviction for the young girl's murder was based on circumstantial evidence and incriminating statements he made to investigating officers. Physical evidence found near the body was similar to evidence found in the petitioner's home and automobile. In a written statement, the petitioner admitted that he had offered the victim a ride home from school, she had accepted, and he had driven in another direction. The petitioner remembered "being stopped somewhere and she was screaming and I put my hand over her mouth and she quit breathing." Verbally, the petitioner admitted removing the victim's clothes, using rope to tie her hands, and placing plastic bags over her body. When asked if he had any type of sexual relations with the victim, the petitioner said he thought he had tried but could not do it or could not bring himself to do it. The testimony of the officers indicates that the petitioner had difficulty remembering the details of the killing when questioned.

II. ISSUES AND DISCUSSION

A. The Petitioner's Mental Competence to Stand Trial and be Sentenced.

The trial court granted a pretrial motion by the defense for an order allowing a private psychiatrist to enter the petitioner's prison and examine him. In a subsequent pretrial hearing on the State's motion for a separate psychological examination, the petitioner's attorney asserted that he knew of no evidence having been presented to the court to suggest incompetency and that, absent such evidence, it would be improper for the court to order an additional examination. The State's motion was denied. The petitioner did not claim mental incompetency or allege an insanity defense at trial. In the presentence report, however, the defense attorney is attributed with the statement that the petitioner had been unable to recall the details of the crime and this had impaired the petitioner's assistance in his defense. Moreover, the petitioner now proffers a psychological evalua-

tion made after his conviction which purports to demonstrate that he suffers from catathymic amnesia, a mental disorder which prevents him from recalling traumatic experiences. Based on this recent evaluation, the petitioner contends that in 1978 he was incompetent to stand trial and be sentenced.

On motion for post-conviction relief, the Supreme Court of Florida summarily held that the petitioner's claim of mental incompetence was procedurally barred because he had failed to argue the claim in direct appeals to the state courts. *Adams v. State*, *supra*, 456 So.2d at 890, *citing McCrae v. State*, 437 So.2d 1388 (Fla.1983). No evidentiary hearing was held in state court to determine whether the petitioner was mentally incompetent at the time of trial and sentencing.

The district court below similarly denied the petitioner's claim of incompetency, (1) citing procedural default or waiver due to his failure to argue this claim before the state courts on direct appeal, and (2) finding, in any event, that insufficient evidence had been presented to raise a legitimate doubt as to the petitioner's mental competence and thereby establish his entitlement to a competency hearing. Again, no evidentiary hearing was held. Instead, the district court relied solely on the trial transcript and other documentary evidence.

[1] 1. *Procedural Default.* Binding precedent fully supports the petitioner's contention that the procedural default rule of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), does not operate to preclude a defendant who failed to request a competency hearing at trial or pursue a claim of incompetency on direct appeal from contesting his competency to stand trial and be sentenced through post-conviction proceedings. *See Zapata v. Estelle*, 588 F.2d 1017, 1021 (5th Cir.1979); *Nathaniel v. Estelle*, 493 F.2d 794, 798 (5th Cir.1974); *Bruce v. Estelle*, 483 F.2d 1031, 1037 (5th Cir.1973). Indeed, as the Supreme Court stated in *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.* at 384, 86 S.Ct. at 841; *Zapata v. Estelle*, *supra*, 588 F.2d at 1021; *Bruce v. Estelle*, *supra*, 483 F.2d at 1037. Therefore, the district court below erred in holding that the petitioner was procedurally barred from pursuing a claim of mental incompetency in a federal habeas corpus proceeding.

The district court's opinion attempts to distinguish *Pate v. Robinson* on factual grounds, noting that Robinson's sanity had been "very much at issue" throughout the criminal proceedings against him, while the petitioner in this case considered but rejected proffering an insanity plea. This factual difference does exist, but the district court's reasoning pretermits the initial conclusion in *Pate v. Robinson* and ignores subsequent decisions in this Circuit. The Supreme Court in *Pate v. Robinson* first reasoned that one who is incompetent cannot waive his right to a competency hearing. The secondary basis for its holding was that, "[i]n any event," waiver had not actually occurred because Robinson had made his sanity an issue throughout his trial. *Pate v. Robinson*, *supra*, 383 U.S. at 384, 86 S.Ct. at 841. Later decisions in this Circuit have applied the initial rationale of *Pate v. Robinson* in such a manner as to obviate the need for any inquiry into whether a convicted defendant who is alleging mental incompetency actually waived his right to a competency hearing at the time of his trial. These decisions have squarely held that waiver cannot occur. *See Zapata v. Estelle*, *supra*, 588 F.2d at 1021; *Nathaniel v. Estelle*, *supra*, 493 F.2d at 798; *Bruce v. Estelle*, *supra*, 483 F.2d at 1037.

[2, 3] 2. *Evidence of Mental Incompetence.* Although the petitioner is not procedurally barred in these habeas proceedings from challenging his mental competency, he is not automatically entitled to a hearing on this claim.[1] The legal test for

1. Nor is the petitioner automatically entitled to a hearing on his claim that his attorney rendered ineffective assistance by not fully investi-

mental competency is whether, at the time of trial and sentencing, the petitioner had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and whether he had "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). As a matter of procedural due process, a criminal defendant is entitled to an evidentiary hearing on his claim of incompetency if he presents clear and convincing evidence to create a "real, substantial and legitimate doubt as to [his] mental capacity ... to meaningfully participate and cooperate with counsel...." *Bruce v. Estelle*, *supra*, 483 F.2d at 1043; *see also Zapata v. Estelle*, *supra*, 588 F.2d at 1021-22; *Nathaniel v. Estelle*, *supra*, 493 F.2d at 798. The standard of proof is high. The facts must "positively, unequivocally and clearly generate" the legitimate doubt. *Bruce v. Estelle*, *supra*, 483 F.2d at 1043; *see also Pride v. Estelle*, 649 F.2d 324, 326 (5th Cir.1981) (requiring "more than a showing by a preponderance of the evidence" that the petitioner might have been incompetent at the time of the state trial).

The district court below found that the petitioner had not presented sufficient evidence to create a "real, substantial, and legitimate doubt" as to his mental competence to stand trial and be sentenced. Therefore, he was not entitled to an evidentiary hearing. In reaching this conclusion, the district court considered the trial transcript and other supporting documents. No live testimony was taken. Our review of findings based on such a record is, nevertheless, constrained by the usual strictures of the clearly erroneous standard. *Anderson v. Bessemer City*, — U.S. —, —, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985); *see Dothan Coca-Cola Bottling Co. v. United States*, 745 F.2d 1400, 1402-04 (11th Cir.1984) (choosing the clearly erroneous standard where the lower court considered only transcript of prior trial and other documentary evidence). Under the proper standard of review, we agree with the finding of the district court, though not with its reasoning entirely.

[4] In finding that the petitioner had failed to raise a real, substantial, and legitimate doubt as to his competency to stand trial, the district court noted the statement made by the petitioner's attorney at the pretrial hearing that he then knew of no evidence to suggest the petitioner was incompetent. This statement was made, but its importance is limited by the context. As of the date of the hearing, the psychological testing of the petitioner was not sufficiently complete for the attorney to conclude that no claim of incompetency would be raised. Indeed, the transcript of the hearing clearly reflects that the attorney had not yet determined whether raising such a claim would be appropriate.[2] Therefore, the statement itself should be given little weight in deciding whether a doubt as to the petitioner's competency exists. By contrast, it is highly significant that the petitioner's counsel did not later claim during trial or sentencing that the petitioner was in fact incompetent. This failure to raise the competency issue is persuasive evidence that the petitioner's mental competence was not in doubt and therefore he is not entitled to an evidentiary hearing. *E.g., Reese v. Wainwright*, 600 F.2d 1085, 1092 (5th Cir.), *cert. denied*, 444 U.S. 983, 100 S.Ct. 487, 62 L.Ed.2d 410 (1979).

[5] The district court also criticized the "self-serving" nature of the statement attributed to the petitioner's attorney in the presentencing report to the effect that the petitioner's ability to assist with his defense had been limited because he could not recall the details of the killing. We are not persuaded by this conclusory line of reasoning. More important to our decision to affirm the district court's finding is the

gating his competency. *See infra* note 14 and accompanying text.

2. The petitioner's attorney stated at the hearing that the petitioner's family intended to engage a psychiatrist "to examine [the petitioner] prior to the filing of any suggestions of competency and sanity, if the same were appropriate."

limited nature of the statement itself. The presentence report summarizes the attorney's remarks: "Prior [to] and during the trial, Dennis Adams could not remember and therefore could not provide information concerning the killing that would assist with his defense." The district court recognized in a footnote, and we agree, that this statement is quite different from a contention that the petitioner lacked the "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and lacked "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, *supra*, 362 U.S. at 402, 80 S.Ct. at 789. While a defendant's inability to remember his participation in a crime may have some bearing on whether he is mentally incompetent, it is possible for a defendant to have no recall of his involvement in a crime and yet fully understand the proceedings against him and cooperate meaningfully with his attorney in his defense. The right not to be tried and sentenced unless mentally competent does not extend so far as to ensure total recall.

[6] Finally, the district court below discounted the recent psychological evaluation diagnosing the petitioner as suffering from catathymic amnesia. As had the Florida Supreme Court on the petitioner's motion for post-conviction relief, the district court concluded that the new psychological evaluation reflected only the petitioner's present condition and shed little light on his condition at the time of trial and sentencing. On appeal, the petitioner argues that the evaluation is not limited in analysis to his present condition, but we find nothing in the record to support this contention. The evaluation does not even appear to have been made a part of the record on appeal, and thus we are unable to consider its content. We cannot say, then, that the district court's finding is erroneous. Having failed to raise a real, substantial, and legitimate doubt as to his competency to stand trial and be sentenced, the petitioner is not entitled to an evidentiary hearing on this claim.

B. The Felony-Murder Instruction at the Guilt-Innocence Phase.

The indictment charged the petitioner with premeditated murder. Felony murder was not alleged. However, the verbal charge given the jury during the guilt-innocence proceedings listed, as "murder in the first degree," both premeditated murder and felony murder, with the latter being defined as killing during the commission of, or an attempt to commit, "rape,[3] . . . abominable and detestable crime against nature or kidnapping. . . ." The Florida statute prohibiting abominable and detestable crimes against nature had been declared unconstitutional before the petitioner's trial. *Franklin v. State*, 257 So.2d 21 (Fla. 1971). The jury returned a general verdict finding the petitioner guilty of murder in the first degree, without specifying whether the crime was premeditated or whether it simply occurred while the petitioner was committing or attempting to commit one of the enumerated felonies.

In *Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), the Supreme Court held that a conviction cannot be upheld if (1) the jury was instructed that a guilty verdict could be returned with respect to any one of several listed grounds, (2) it is impossible to determine from the record on which ground the jury based the conviction, and (3) one of the listed grounds was constitutionally invalid. Citing *Stromberg*, the petitioner claims that the trial court's reference to an invalid crime, when coupled with the jury's general verdict, necessitates a reversal.[4]

3. The reference to rape here was in error, since the crime did not exist under Florida law. Had the felony-murder instruction been warranted in the first instance, the proper instruction would have referenced and defined sexual battery. *See Adams v. State*, *supra*, 412 So.2d at 852. However, because we hold that the jury considered and found the petitioner guilty only of premeditated murder, this error in the felony-murder definition was harmless.

4. The petitioner further claims that his attorney's failure to object to the trial court's instructions and the general form of the verdict constitutes ineffective assistance of counsel. Since we hold the substantive *Stromberg* claim to be with

The Florida Supreme Court rejected this claim. Without citing *Stromberg*, the court engaged in a determination of whether the evidence was sufficient to support a finding of premeditated murder. The court held that, "[a]lthough an erroneous or uninvited felony murder instruction was given, the evidence of premeditation was sufficient to render the erroneous instruction harmless." *Adams v. State*, *supra*, 412 So.2d at 853.

The Florida Supreme Court's approach to deciding the petitioner's *Stromberg* claim was incorrect. The proper approach is to examine only the trial court's instructions and the jury's verdict, not the sufficiency of the evidence to support the verdict. *Stromberg* does not suggest a harmless error standard based on overwhelming evidence of guilt under the valid portion of the jury charge. Rather, *Stromberg* states simply that if it is "impossible" to say on which ground the verdict rests, the conviction must be reversed. *Stromberg v. California*, *supra*, 283 U.S. at 368, 51 S.Ct. at 535.

The district court below reiterated the Florida court's conclusion as to the sufficiency of the evidence before approaching this claim correctly by examining the jury instructions and the closing arguments made at trial and asking whether, under the circumstances, the jury could only have considered and found premeditated murder. The district court concluded that the record left no uncertainty as to the ground on which the verdict rested. That ground was premeditated murder. After reviewing the transcript of the trial, particularly the closing arguments at the guilt-innocence phase and the trial court's instructions, we agree.

[7] The trial court's reference to the capital felony of killing during the commission of or an attempt to commit rape, a crime against nature, or kidnapping as murder in the first degree appears early in the instructions as part of what were, in essence, statutory definitions.[8] The actual

out merit, the attorney's failure to object cannot be held to constitute ineffective assistance.

8. The trial court's instructions state, in relevant part:

> The Defendant, Aubrey Dennis Adams, Jr., is charged with the crime of first degree murder in that on January the 23rd, 1978, in Marion County, Florida, he did unlawfully, from a premeditated design to effect the death of Trisa Gail Thornley ... kill and murder Trisa Gail Thornley ... in violation of Florida Statute 782.04.
>
> The charge of premeditated murder includes the lesser charges of: One, second degree murder; two, third degree murder; and, three, manslaughter.
>
> The Defendant has entered his plea of not guilty. The effect of this plea is to require the State to prove each material allegation of the Indictment beyond and to the exclusion of every reasonable doubt before the Defendant may be found guilty.
>
> The killing of one human being by another is called homicide. Every homicide falls within one of these four classes: One, justifiable homicide; two, excusable homicide; three, murder in the first, second or third degree; and, four, manslaughter.
>
> The circumstances of each case determine whether a homicide is justifiable, excusable, murder or manslaughter.
>
> Justifiable homicide and excusable homicide are lawful. Murder and manslaughter are unlawful and constitute violations of the criminal laws.
>
> The essential elements of unlawful homicide, together with other matters that must be proved beyond and to the exclusion of every reasonable doubt before there can be a conviction in this case, are as follows: One, Trisa Gail Thornley is, in fact, dead; two, such death was caused by the criminal act or agency of another; and, three, the death was caused by the Defendant, Aubrey Dennis Adams, Jr.
>
> These four classes of homicide must now be defined to you so that you can properly understand them.
>
> The first class that I made reference to: The killing of a human being is justifiable homicide and lawful when ...
>
> The second class: Excusable homicide is ...
>
> Homicide is excusable and lawful if it is committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used ...
>
> A sudden and sufficient provocation is ...
>
> The heat of passion is ...
>
> A dangerous weapon is ...
>
> The third class: Murder in the first degree, is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being.
>
> A premeditated design to kill is ...
>
> The question of premeditated design is a question of fact to be determined by the Jury.

and controlling charge came later in the instructions, when the trial court told the jurors that, if the elements of homicide were found, their next task would be to determine its degree. At this point, premeditated murder was the only killing stated to constitute murder in the first degree.[6] Therefore, the jurors were actually instructed to consider only premeditated murder as murder in the first degree. That their consideration was so limited is further evidenced by three significant facts: (1) a felony-murder theory was not advanced at trial, (2) the closing arguments of both the State and the petitioner focused on premeditation to the complete exclusion of felony murder,[7] and (3) the indictment charging only premeditated murder was submitted to the jurors along with all of the evidence for use in their deliberations. Under these circumstances, it is not impossible to determine on which ground the petitioner's conviction for first degree murder rests. The record reflects certainty that the conviction was for premeditated murder and not felony murder.

C. The Failure to Instruct as to the Elements of Underlying Felonies.

[8] After instructing the jury that killing during the commission of, or an attempt to commit, rape or kidnapping constituted murder in the first degree, the trial court failed to define the elements of these underlying felonies. The petitioner here contends that the incomplete instruction so infected the guilt-innocence phase of his trial as to violate due process, in that it deprived him of the right to have the jury decide whether each element of the crime had been proved beyond a reasonable doubt.[8] *See Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977); *cf. Glenn v. Dallman*, 686 F.2d

> The killing of a human being in committing, or attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree, even though there is no premeditated design or intent to kill.
>
> If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime, the killing is in the perpetration of or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

6. The listed felonies were only mentioned by reference in order to distinguish all other felonies as relevant to a finding of murder in the *third* degree:

> To summarize: The essential elements of an unlawful homicide which must be proved beyond a reasonable doubt in this case before there can be a conviction of any offense are as follows. One, that Trisa Gail Thornley is, in fact, dead; two, that the killing was wrongful and by the means stated in the Indictment; three, that Trisa Gail Thornley was killed by the Defendant; and, four, that the killing was neither justifiable or [sic] excusable homicide.
>
> If the elements are established, then it will be necessary for you to determine the degree of the unlawful homicide.
>
> *If the Defendant, in killing the deceased, acted from a premeditated design to effect the death of the deceased, or some other human being, he should be found guilty of murder in the first degree.* (emphasis added)
>
> If the killing was not from a premeditated design to effect the death of any human being, but was in the perpetration of an act imminently dangerous to another, evincing a depraved mind, regardless of human life, the Defendant should be found guilty of murder in the second degree.
>
> If the killing took place while the Defendant was engaged in the commission of a felony other than arson, *rape*, robbery, burglary, the *abominable and detestable crime against nature* or *kidnapping*, the Defendant should be found guilty of murder in the *third* degree. (emphasis added).
>
> If the killing was by the act, procurement or culpable negligence of the Defendant and was not murder in any degree or justifiable or excusable homicide, the Defendant should be found guilty of manslaughter.
>
> Of course, if any one of the essential elements of any unlawful homicide has not been proved beyond a reasonable doubt, the Defendant should be found not guilty.

7. Both the prosecuting attorney and the petitioner's attorney equated first degree murder with premeditated murder for purposes of this trial.

8. The petitioner also raises an ineffective assistance of counsel claim based on his trial attorney's failure to object to the incomplete charge. Since we hold the underlying claim to be without merit, the attorney's failure to object cannot constitute ineffective assistance.

418 (6th Cir.1982) (vacating a conviction where the trial court had omitted in its instructions an essential element of the only crime charged, harmless error rule held inapplicable). However, since we have already determined that the jury considered and found only premeditated murder, given the particular circumstances of this trial, the incomplete instruction did not deprive the petitioner of his right to have a fully informed jury decide guilt or innocence. The petitioner does not claim that the trial court improperly instructed the jury as to the necessary elements of proof for a finding of premeditated murder. Failing to inform the jury as to the elements of the felonies incorrectly mentioned but not charged in the indictment and not considered or found by the jury does not constitute reversible error.

An analogous claim is raised with respect to the trial court's instructions at the sentencing phase of the petitioner's trial. The instructions listed the statutory aggravating factors that the jury could properly consider in reaching an advisory verdict. One of the three aggravating factors was that the killing had occurred during the commission of, or an attempt to commit, rape or kidnapping. Again, however, the trial court did not define the elements of these felonies. The jury's advisory verdict recommended a sentence of death but did not specify which aggravating factor(s) a majority of the jurors found to exist beyond a reasonable doubt. The trial court later specifically found that three aggravating factors had been proved: (1) the murder had occurred during the commission of, or an attempt to commit, rape or kidnapping, (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest, and (3) the murder was especially heinous, atrocious, or cruel. *See* Fla. Stat. §§ 921.141(5)(d), (e), (h).

[9] We hold that the incomplete jury instruction did not so infect the entire sentencing proceeding that the penalty ultimately imposed violates the petitioner's due process rights. *See Henderson v. Kibbe, supra*, 431 U.S. at 154–55, 97 S.Ct. at 1736–37. However, we reject as a rationale for this holding the broad notion that the merely advisory role of the sentencing jury under Florida law renders *any* given error in a sentencing proceeding nonconstitutional in stature. This approach was recently noted but appropriately not followed by a panel of this Court in *Proffitt v. Wainwright*, 756 F.2d 1500, 1502 (11th Cir.1985) (citing *Spaziano v. Florida*, — U.S. —, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984)).

[10] The jury's role in an advisory sentencing proceeding is critical. A verdict recommending life imprisonment establishes an important set of parameters beyond which the trial judge may exercise his discretion in reaching a sentence of death only if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). Every error committed before the jury at a sentencing proceeding will have some *conceivable* effect on the jury's verdict and thus may affect the jury's determination of the guiding parameters for sentencing in the case. Every error in instruction which makes it less likely that the jury will recommend a life sentence to some degree deprives the defendant of the protections afforded by the presumption of correctness that attaches to a jury's verdict recommending life imprisonment. There may be a case in which a substantively incorrect instruction will mislead the jury to such an extent that the parameters created by the jury's verdict are so far off their proper mark that the instruction alone justifies reversal. An erroneous instruction may also provide convincing evidence that the trial judge himself misunderstood or misapplied the law when he later actually found and balanced aggravating and mitigating factors.

Not every error in instruction, however, will be so prejudicial as to require resentencing. An *incomplete* instruction is less likely to prejudice the defendant than one which is substantively incorrect. *See Henderson v. Kibbe, supra*, 431 U.S. at 155, 97 S.Ct. at 1737. The latter misstates the applicable law; the former is consistent with the applicable law but simply fails to

set it forth in full detail. Moreover, a claim of prejudice is particularly remote where the defendant did not object to the instruction's lack of completeness when the opportunity arose. *Id.* Such is the status of the petitioner's claim here. The jury instruction at sentencing was not substantively erroneous, just incomplete. The petitioner's counsel did not object or move for further instructions. The evidence fully supports the trial court's finding that the murder occurred during the commission of, or an attempt to commit, rape and kidnapping. Under these circumstances, the possibility that the jury would have reached a different verdict and thereby altered the sentencing parameters "is too speculative to justify the conclusion that constitutional error was committed." *Id.* at 157, 97 S.Ct. at 1738; *cf. Westbrook v. Zant*, 704 F.2d 1487, 1501 (11th Cir.1983) (Under Georgia law, and "[u]nder the facts in this case, the trial court was required to do no more regarding the applicable statutory aggravating factors than to repeat the exact statutory language.").

D. The Aggravating Factor of Murder Committed for the Purpose of Avoiding Arrest.

As noted previously, one of the three statutory aggravating factors found by the trial court to justify imposing the death penalty was that the petitioner had killed the victim in order to avoid or prevent his arrest. *See* Fla.Stat. § 921.141(5)(e). The facts enumerated by the trial court in support of this finding were: (1) actual or attempted kidnapping and rape had been proven, implying that the petitioner had reason to fear arrest, and (2) the murder prevented the victim from later identifying the petitioner. In affirming the sentence, the Florida Supreme Court added: (1) the victim knew the petitioner and could have identified him if permitted to live, and (2) the petitioner had hidden the victim's body. *Adams v. State*, *supra*, 412 So.2d at 856. The district court below concluded: "The aggravating factor of avoiding arrest was not found in this case simply because the victim's body was hidden;[9] rather, the evidence supports the finding that death was preceded by kidnapping and rape and that the victim was murdered to prevent [the petitioner's] discovery and conviction for these felonies." *Adams v. Wainwright*, *supra*, No. 84-170-Civ.-Oc-16, Op. at 10-11.

Citing a recent Florida Supreme Court decision, *Doyle v. State*, 460 So.2d 353 (Fla. 1984), in which the court reversed a finding of this same aggravating factor in a rape-murder context, the petitioner asserts that no meaningful basis exists for distinguishing between cases involving a real avoidance motive for killing and cases not involving this motive. Without such a basis, argues the petitioner, the imposition of the death penalty in the present case, to the extent it is based on this aggravating factor, is arbitrary and hence unconstitutional. *See Godfrey v. Georgia*, 446 U.S. 420, 427-28, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980); *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976).

Like this case, *Doyle* involved sexual battery and murder of a victim who knew the defendant. The trial court found as aggravating factors that the murder was committed both in the course of sexual battery, *see* Fla.Stat. § 921.141(5)(d), and in order to avoid lawful arrest, *see* Fla.Stat. § 921.141(5)(e). In holding that the State had not proved the latter aggravating factor beyond a reasonable doubt, the Florida Supreme Court stated in *Doyle*: "It is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire

9. The petitioner's attempt to conceal the victim's body by placing it in plastic bags and depositing it in a remote area, a fact the Florida Supreme Court relied upon in affirming the trial court's finding, is too ambiguous to comprise a part of our rationale for holding that the State proved beyond a reasonable doubt that the petitioner committed the murder in order to avoid detection. Concealment of the body is as much evidence of an intent to avoid detection of the murder as it is evidence of an intent to avoid detection of actual or attempted rape and kidnapping.

to avoid detection." *Doyle v. State*, *supra*, 460 So.2d at 358. Based on this statement, the petitioner argues that the victim's death in this case resulted from an impulsive manual strangulation which was an integral part of the attempted rape of the victim and not a reasoned act motivated by a desire to avoid detection and arrest.

In essence, the petitioner's argument is that by finding the aggravating factor, killing during the commission of actual or attempted rape, a trial court is prevented from finding as an additional aggravating factor that the killing was motivated by a desire to avoid detection and prevent arrest. *Doyle*, however, did not hold that these two aggravating factors were mutually exclusive in every case involving both murder and rape. Indeed, the *Doyle* court implied otherwise by holding that, based on the facts in the record of that case, the State simply had not proven an avoidance motive beyond a reasonable doubt. The *Doyle* court rejected the State's attempt to prove this factor by drawing weak inferences from the victim's ability to identify the defendant as her rapist and from the likelihood that a five-year suspended sentence of the defendant for a prior offense would be reimposed if he were arrested and convicted of rape.[10] Thus, as we interpret *Doyle*, proof of murder while committing actual or attempted rape will not invariably preclude a finding that the defendant acted on a premeditated desire to kill in order to avoid detection and prevent arrest. The two aggravating factors can co-exist if both are proven beyond a reasonable doubt. Proof that the petitioner's reasoned acts in this case were motivated by a desire to avoid detection does not require an unacceptable reliance on inferences or assumptions. The petitioner's own written confession states that he put his hand over the victim's mouth to silence her screaming, and she quit breathing.

[11] Moreover, unlike *Doyle*, the present case involves a charge of kidnapping as well as rape. The type of hostile-aggressive impulses associated with rape are not as readily implicated in a kidnapping case. The rape and murder in *Doyle* occurred as part of a single incident of impulsive violence committed at one location. Under these circumstances, the court was appropriately skeptical of the State's attempt to infer an avoidance motive for killing from the simple fact that a rape had occurred. By contrast, the kidnapping here involved transportation of the victim from one location to another and entailed the commission of deliberate acts to avoid detection.[11] These acts resulted in the victim's death. Killing during the commission of kidnapping and killing motivated by a desire to avoid detection of the kidnapping can comprise separate aggravating factors in the same case.[12] *See, e.g., Stevens v.*

10. *See also Rivers v. State*, 458 So.2d 762, 765 (Fla.1984) (requiring "direct evidence as to motive or at least very strong inference from the circumstances"); *Menendez v. State*, 368 So.2d 1278, 1282 (Fla.1979) (That murder weapon was fitted with a silencer, the purpose of which was to minimize detection, did not clearly show the dominant motive for killing was to avoid arrest by eliminating a witness to a robbery; where events preceding the actual killing are unknown, court will not assume defendant's motive; the burden was on the state to prove it.).

11. The jury verdict at the guilt-innocence phase of the trial is consistent with this conclusion since, as we have already held, the verdict rested solely on the jury's finding that the petitioner had murdered the victim in a premeditated fashion. *Cf. Rivers v. State*, *supra*, 458 So.2d at 765 (fact that jury found defendant guilty of felony murder, not premeditated murder, supported reversal of trial court's finding that the murder was committed for the purpose of avoiding lawful arrest).

12. We do not suggest, however, that in every case in which the State alleges and proves kidnapping in addition to rape the trial court can mechanically find, as an aggravating factor, killing in order to avoid detection and prevent arrest. Under a literal reading of Florida's criminal statutes, sexual battery will nearly always entail at least the possibility of a kidnapping charge. *See* Fla.Stat. § 787.01(1)(a)(2) (defining "kidnapping" to include forcibly confining another person against his or her will with intent to commit a felony); Fla.Stat. § 794.011 (defining sexual battery and establishing it as a felony). Yet proof of kidnapping in a sexual battery case will not necessarily enable the State to avoid the effect of the Florida Supreme Court's holding in *Doyle*. The evidence must also show conclusively, as it did here, that the defendant did not kill as the result of a single

State, 419 So.2d 1058, 1064 (Fla.1982); *Card v. State*, 453 So.2d 17, 24 (Fla.), *cert. denied*, — U.S. —, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

E. The Ineffective Assistance of Counsel Claims.

[12] Finally, the petitioner raises an array of ineffective assistance of counsel claims,[13] alleging that his attorney failed: (1) to adequately investigate and present evidence of his mental incompetency to stand trial or be sentenced; (2) to object to a jury instruction which listed lesser degrees of homicide for which no evidence had been presented; (3) to develop and present in mitigation evidence of his mental condition at the time of the murder; (4) to object to an instruction at sentencing which did not inform the jurors of their ability to recommend life imprisonment even though mitigating factors were outweighed by aggravating factors; (5) to object to an instruction at sentencing which listed aggravating factors not supported by any evidence; and (6) to object to an instruction at sentencing which omitted the statement that a tie vote among jurors would mandate a recommendation of life imprisonment. We have reviewed the portions of the record relevant to each of these claims, and, applying the test announced by the Supreme Court in *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we affirm the denial of habeas corpus relief on this ground. None of the claims involved both professional conduct that was unreasonable under the circumstances and a reasonable probability that, but for the challenged conduct, the result of the particular proceedings would have been different. *Id.* at —, 104 S.Ct. at 2064–69, 80 L.Ed.2d at 693–99. The claims were argued in a cursory fashion in the briefs of both parties and deserve only summary treatment here.

First, neither the scope of the investigation of the petitioner's mental competency nor his attorney's decision not to pursue a claim of incompetency prejudiced the outcome of the petitioner's case.[14] Before trial, the petitioner's attorney arranged for an examination of the petitioner by a private psychiatrist for the purpose of determining whether an insanity defense could be proffered. This examination uncovered no basis for an incompetency claim. The petitioner did have difficulty remembering certain details concerning the murder, but his ability to participate meaningfully in his defense was not in such doubt that further examinations should have been undertaken. As we have already held, it appears from the record on appeal that even the petitioner's post-trial examinations fail to raise a real, substantial, and legitimate doubt as to his mental competency at the time of trial. Since the requisite doubt has not and apparently could not have then been raised, the attorney's conduct in investigating and his decision not to pursue a claim of incompetency did not result in prejudice.

Second, the attorney's failure to object to the instruction listing lesser degrees of homicide, apart from possibly being reasonable trial strategy, similarly did not prejudice the outcome of the petitioner's trial.

aggressive and impulsive sexual desire, but rather that an independent reasoned motive to avoid detection and arrest existed. Proof of this motive must be "very strong." *Riley v. State*, 366 So.2d 19, 22 (Fla.1978), *cert. denied*, 459 U.S. 1138, 103 S.Ct. 773, 74 L.Ed.2d 985 (1983); *Routly v. State*, 440 So.2d 1257, 1263 (Fla.1983).

13. See also *supra* notes 4 and 8.

14. With respect to his attorney's failure to pursue a claim of incompetency, the petitioner characterizes the ineffective assistance inquiry as purely factual, thereby hoping to obtain an evidentiary hearing as required in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). In *Strickland v. Washington*, however, the Supreme Court described the inquiry as "a mixed question of law and fact." — U.S. at —, 104 S.Ct. at 2070, 80 L.Ed.2d at 700. Thus, the need for an evidentiary hearing does not arise unless there exists a genuine dispute as to the underlying, operative facts. Here, what the petitioner's attorney did and did not do both in investigating and deciding not to pursue an incompetency claim are not genuinely in dispute. Nor has the petitioner created in this appeal an unresolved issue of fact concerning the results of his post-trial psychological examination. The State's assertion that these results do not speak to the petitioner's competency at the time of trial and sentencing stands unrebutted.

It would certainly have been reasonable for the attorney not to object and instead to hope that, if the jury returned a guilty verdict, this verdict would be based on one of the lesser degrees of homicide listed. In any event, no prejudice resulted from the inclusion of these lesser degree crimes as part of the instruction, and hence no prejudice resulted from the attorney's failure to object. In reaching this holding, we are aware that Florida's rules of criminal procedure have been altered since the date of the petitioner's trial to require a trial court to charge only on lesser degrees that are supported by the evidence. *See In re Florida Rules of Criminal Procedure*, 403 So.2d 979 (Fla.1981); Fla.R.Crim.P. 3.490. The petitioner claims that, under the old rules, instructing on lesser degree homicides not supported by the evidence invited jurors to disregard their oaths at the guilt-innocence phase and arbitrarily find guilt of a lesser degree in some cases but not in others, depending upon whether they felt the death penalty was an inappropriate sentence. *See Roberts v. Louisiana*, 428 U.S. 325, 334–36, 96 S.Ct. 3001, 3006–07, 49 L.Ed.2d 974 (1976) (invalidating Louisiana statute that mandated death penalty whenever jury returned a guilty verdict of first degree murder). Under Florida's bifurcated procedures, however, a death sentence does not automatically follow a verdict of guilty in the first degree. As the jury in this case was expressly instructed, a separate sentencing hearing must be held and an advisory verdict rendered. Therefore, even under the old rules, jurors in Florida who were inclined to dispense mercy were not faced with the necessity of finding a lesser degree at the guilt-innocence stage in order to avoid ultimately imposing the death penalty. *See Hitchcock v. Wainwright*, 745 F.2d 1332, 1341–42 (11th Cir. 1984), *vacated*, 745 F.2d at 1348 (pending en banc review). The possibility that in another case the jury could, under similar circumstances, find a particular defendant guilty of a lesser degree of homicide and thus preclude any consideration of the death penalty for that defendant does not mean the petitioner in the present case was sentenced to death arbitrarily. The sentencing phase of the petitioner's trial afforded him full opportunity to present mitigating evidence and pleas for mercy. Nevertheless, the jury recommended the death penalty. Not having been prejudiced by the instruction, the petitioner cannot show that the outcome of his case would have been different had his attorney raised an objection.

Third, from a review of the record it is evident that the attorney did not fail to develop and present in mitigation evidence of the petitioner's mental condition at the time of the murder. As noted by the district court below, several witnesses, including a psychiatrist, testified in relation to the petitioner's state of severe emotional stress. Accordingly, the trial court found as one of three mitigating factors that the murder had been committed while the petitioner was under the influence of extreme mental or emotional disturbance. Clearly, then, the petitioner's attorney provided reasonably effective assistance of counsel on this issue.

Fourth, the attorney did not unreasonably fail to object to the instruction at sentencing on the basis that the trial court had neglected to inform the jurors of their ability to recommend life imprisonment even if mitigating factors did not outweigh aggravating factors. The petitioner claims the instructions incorrectly implied that, in order for the jury to recommend a life sentence, it would have to find mitigating factors to outweigh whatever aggravating factors it found to exist. *See Morgan v. Zant*, 743 F.2d 775, 779 (11th Cir.1984) (dicta). In actuality, however, the sentencing instructions given in this case neither expressly nor implicitly foreclosed the jury's ability to exercise mercy and recommend a life sentence even though no mitigating factors were present. To the contrary, after listing and defining the statutory aggravating factors enumerated in Florida's capital punishment statute, and *before* listing possible mitigating factors and describing their function generally, the trial court stated that the jurors were duty-bound to recommend a sentence of life imprisonment if, in their opinion, the aggra-

vating factors found were not "sufficient" to justify imposing the death penalty. That sufficient aggravating factors must exist before the death penalty could even be considered an appropriate sentence, thereby triggering the jury's consideration of mitigating evidence, was made clear by three additional references to this requirement elsewhere in the instructions. In sum, the sentencing instructions the trial court gave in this case would encompass the broadest exercise of a jury's discretion in mercifully recommending a life sentence. There simply was no such exercise of discretion here. *See Tucker v. Zant*, 724 F.2d 882, 891-92 (11th Cir.1984); *Westbrook v. Zant, supra*, 704 F.2d at 1502-03. Since the instruction was adequate, the failure of the petitioner's attorney to object did not deprive him of effective assistance of counsel.

Fifth, the attorney's failure to object to a jury instruction which listed aggravating factors not supported by any evidence did not prejudice the outcome of the petitioner's sentencing proceeding. The trial court enumerated all aggravating factors set forth in Florida's capital punishment statute. The petitioner claims this may have caused the jury to conclude that factors not supported by the evidence in fact existed. This claim is without merit. The jury is presumed to have followed the trial court's express instructions that each aggravating factor found and relied upon in recommending the death penalty be proved beyond a reasonable doubt and that only the evidence presented at the sentencing hearing be considered. The simple assertion that the court's listing of aggravating factors not supported by the evidence made these factors *appear* to be present and thus misled the jury into concluding that they were indeed present fails to overcome this strong presumption. Since the instruction itself did not result in prejudice, the attorney's failure to object did not constitute ineffective assistance.

Finally, the attorney's failure to object to an instruction which omitted the statement that a tie vote among jurors would mandate a recommendation of life imprisonment did not prejudice the outcome of the sentencing proceeding. A similar claim was rejected by this Court in *Henry v. Wainwright*, 743 F.2d 761, 763 (11th Cir. 1984), because the defendant could not show that the jury was ever equally divided. Likewise, the petitioner here has not established that the jury was in fact split six-to-six. Bound by precedent, we hold that the instruction did not alter the outcome of the petitioner's sentencing proceeding and therefore no prejudice resulted from the attorney's failure to object.

The denial of petitioner's petition for writ of habeas corpus is AFFIRMED.

Jack Howard POTTS,
Petitioner-Appellee,
Cross-Appellant,

v.

Ralph KEMP, Warden, Georgia Diagnostic and Classification Center,
Respondent-Appellant, Cross-Appellee.

No. 83-8087.

United States Court of Appeals,
Eleventh Circuit.

June 21, 1985.

Petitioner whose conviction of aggravated assault, kidnapping with bodily injury, and armed robbery had been affirmed, 241 Ga. 67, 243 S.E.2d 510, appealed from an order of the United States District Court for the Northern District of Georgia, 492 F.Supp. 326, dismissing his federal habeas petitions. The Court of Appeals, 638 F.2d 727, affirmed in part, and vacated and remanded in part, and denied rehearing, 642 F.2d 1210. The District Court, Charles A. Moye, Jr., Chief Judge, 575 F.Supp. 374, granted relief. On appeal, the Court of Appeals, 734 F.2d 526, affirmed. On State's petition for rehearing, the Court of

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 13 1985
SPENCER D MERCER
CLERK

No. 84-3646

AUBREY DENNIS ADAMS,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT and JIM SMITH,

Respondents-Appellees.

- - - - - - - - - - - - -

Appeal from the United States District Court for the
Middle District of Florida

- - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 17, 1985, 11 Cir., 198_; ____F.2d____).
(August 13, 1985)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

REEC-6
(Rev. 6/82)

CHAPTER 782

HOMICIDE

782.02 Justifiable use of deadly force.
782.03 Excusable homicide.
782.04 Murder.
782.07 Manslaughter.
782.071 Vehicular homicide.
782.08 Assisting self-murder.
782.09 Killing of unborn child by injury to mother.
782.11 Unnecessary killing to prevent unlawful act.

782.02 Justifiable use of deadly force.—The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or upon or in any dwelling house in which such person shall be.

History.—ss. 4, 5, ch. 1637, 1868; RS 2378; ch. 4967, 1901; s. 1, ch. 4964, 1901; GS 3203; RGS 5033; CGL 7128; s. 66, ch. 74-383; s. 1, ch. 75-24; s. 43, ch. 75-298.

782.03 Excusable homicide.—Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

History.—s. 6, ch. 1637, 1868; RS 2379; GS 3204; RGS 5034; CGL 7126; s. 1, ch. 75-13.

782.04 Murder.—

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; or

2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:

a. Trafficking offense prohibited by s. 893.135(1),
b. Arson,
c. Sexual battery,
d. Robbery,
e. Burglary,
f. Kidnapping,
g. Escape,
h. Aircraft piracy, or
i. Unlawful throwing, placing, or discharging of a destructive device or bomb; or

3. Which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any:

(a) Trafficking offense prohibited by s. 893.135(1),
(b) Arson,
(c) Sexual battery,
(d) Robbery,
(e) Burglary,
(f) Kidnapping,
(g) Escape,
(h) Aircraft piracy, or
(i) Unlawful throwing, placing, or discharging of a destructive device or bomb

by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony is guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any:

(a) Trafficking offense prohibited by s. 893.135(1),
(b) Arson,
(c) Sexual battery,
(d) Robbery,
(e) Burglary,
(f) Kidnapping,
(g) Escape,
(h) Aircraft piracy,
(i) Unlawful throwing, placing, or discharging of a destructive device or bomb, or
(j) Unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

is murder in the third degree and constitutes a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 2, ch. 1637, 1868; RS 2380; GS 3205; RGS 5035; s. 1, ch. 8470, 1921; CGL 7127; s. 1, ch. 28023, 1953; s. 712, ch. 71-136; s. 2, ch. 72-724; s. 14, ch. 74-383; s. 6, ch. 75-298; s. 1, ch. 75-141; s. 250, ch. 79-400; s. 1, ch. 82-4; s. 1, ch. 83-48.

cf.—s. 316.656 Mandatory adjudication; prohibition against plea to lesser included offense.
s. 732.802 Killer not entitled to receive property or other benefits by reason of victim's death.
s. 903.133 Bail pending review; prohibited for certain first-degree felony convictions.

782.07 Manslaughter.—The killing of a human

CHAPTER 787

KIDNAPPING; FALSE IMPRISONMENT; CUSTODY OFFENSES

787.01 Kidnapping.
787.02 False imprisonment.
787.03 Interference with custody.
787.04 Felony to remove children from state or to conceal children contrary to court order.

787.01 Kidnapping.—

(1)(a) "Kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to:

1. Hold for ransom or reward or as a shield or hostage.

2. Commit or facilitate commission of any felony.

3. Inflict bodily harm upon or to terrorize the victim or another person.

4. Interfere with the performance of any governmental or political function.

(b) Confinement of a child under the age of 13 is against his will within the meaning of subsection (1) if such confinement is without the consent of his parent or legal guardian.

(2) Whoever kidnaps a person is guilty of a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 1, ch. 5807, 1909; RGS 5088; CGL 7160; s. 1, ch. 18063, 1933; s. 784, ch. 71-136; s. 4, ch. 72-724; s. 22, ch. 74-383; s. 12, ch. 75-298; s. 1, ch. 77-174.

Note.—Former s. 805.02.

cf.—s. 903.133 (bail pending review; prohibited for certain first-degree felony convictions).

787.02 False imprisonment.—

(1)(a) "False imprisonment" means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against his will with any purpose other than those referred to in s. 787.01.

(b) Confinement of a child under the age of 13 is against his will within the meaning of this section if such confinement is without the consent of his parent or legal guardian.

(2) Whoever commits the offense of false imprisonment shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 43, sub-ch. 2, ch. 1637, 1868; RS 2399; GS 3225; RGS 5087; CGL 7159; s. 783, ch. 71-136; s. 23, ch. 74-383; s. 13, ch. 75-298.

Note.—Former s. 805.01.

787.03 Interference with custody.—

(1) Whoever, without lawful authority, knowingly or recklessly takes or entices any child 17 years of age or under or any incompetent person from the custody of his parent, guardian, or other lawful custodian commits the offense of interference with custody and shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) It is a defense that:

(a) The defendant reasonably believes that his action was necessary to preserve the child or the incompetent person from danger to his welfare.

(b) The child or incompetent person was taken away at his own instigation without enticement and without purpose to commit a criminal offense with or against the child or incompetent person.

(3) Proof that a child was 17 years of age or under creates the presumption that the defendant knew the child's age or acted in reckless disregard thereof.

History.—s. 24, ch. 74-383; s. 14, ch. 75-298; s. 1, ch. 77-174.

787.04 Felony to remove children from state or to conceal children contrary to court order.—

(1) It is unlawful for any person, in violation of a court order, to lead, take, entice, or remove a child beyond the limits of this state, or to conceal the location of a child, with personal knowledge of the order.

(2) It is unlawful for any person, with criminal intent, to lead, take, entice, or remove a child beyond the limits of this state, or to conceal the location of a child, during the pendency of any action or proceeding affecting custody of the child, after having received notice as required by law of the pendency of the action or proceeding, without the permission of the court in which the action or proceeding is pending.

(3) It is unlawful for any person, who has carried beyond the limits of this state any child whose custody is involved in any action or proceeding pending in this state, pursuant to the order of the court in which the action or proceeding is pending, or pursuant to the permission of the court, thereafter, to fail to produce the child in the court or deliver the child to the person designated by the court.

(4) Any person convicted of a violation of this law shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 1, ch. 21604, 1955; s. 1, ch. 57-227; s. 47, ch. 67-254; s. 785, ch. 71-136; s. 25, ch. 74-383; s. 15, ch. 75-298; s. 1, ch. 80-102.

Note.—Former ss. 6, 141, 805.03.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 256, ch. 19654, 1939; CGL 1940 Supp. 8863(387); s. 122, ch. 79-330.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 27a, ch. 19654, 1939; CGL 1940 Supp. 8863(248); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353; s. 177, ch. 83-216.

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 78-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the Governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 28(a), ch. 19534, 1939; CGL 8428, 8477; CGL 1940 Supp. 8863(27)(a); s. 122, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

(2) A county court or circuit court of this state may direct that the sentence imposed by such court be served concurrently with a sentence imposed by a court of another state or of the United States. In such case, the Department of Corrections may designate the correctional institution of the other jurisdiction as the place for reception and confinement of such person and may also designate the place in Florida for reception and confinement of such person in the event that confinement in the other jurisdiction terminates before the expiration of the Florida sentence. Upon imposing such a sentence, the court shall notify the Florida Parole and Probation Commission as to the jurisdiction in which the sentence is to be served. Any prisoner so released to another jurisdiction shall be eligible for consideration for parole by the Florida Parole and Probation Commission pursuant to the provisions of chapter 947, except that the commission shall determine the presumptive parole release date and the effective parole release date by requesting such person's file from the receiving jurisdiction. Upon receiving such records, the commission shall determine these release dates based on the relevant information in that file and shall give credit toward reduction of the Florida sentence for gain-time granted by the jurisdiction where the inmate is serving the sentence. The Parole and Probation Commission may concur with the parole release decision of the jurisdiction granting parole and accepting supervision.

History.—s. 28(c), ch. 19654, 1939; CGL 1940 Supp. 8863(27)(c); s. 124, ch. 70-339; s. 1, ch. 78-210; s. 34, ch. 79-3; s. 12, ch. 79-42; s. 1, ch. 79-310.

921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.—

(1) A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence.

(2) In addition to other credits, a person sentenced to imprisonment in custody of the Department of Corrections shall receive credit on his sentence for all time spent between sentencing and being placed in custody of the department. When delivering a prisoner to the department, the sheriff shall certify to it in writing:

(a) The date the sentence was imposed and the date the prisoner was delivered to the department.

(b) The dates of any periods after sentence the prisoner was at liberty on bond.

(c) The dates and reasons for any other times the prisoner was at liberty after sentence.

The certificate shall be prima facie evidence of the facts certified.

History.—s. 1, ch. 63-457; ss. 19, 33, ch. 69-106; s. 122, ch. 70-339; s. 1, ch. 70-441; s. 1, ch. 73-71; s. 14, ch. 77-120; s. 23, ch. 79-3.

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
DEC 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-5815

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

AUBREY DENNIS ADAMS,

Petitioner,

v.

LOUIE L. WAINWRIGHT, and
JIM SMITH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondents Louie L. Wainwright and Jim Smith, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 764 F.2d 1356.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONER'S CONVICTION AND SENTENCE OF DEATH RESTS UPON A NONEXISTENT CRIME IN VIOLATION OF THE FOURTEENTH AMENDMENT AND WHETHER THE DECISION OF THE CIRCUIT COURT CONFLICTS WITH A DECISION OF THIS COURT WHERE THIS COURT'S OWN PRIOR DECISION IN STROMBERG V. CALIFORNIA, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) IS CONTROLLING AND WAS PROPERLY APPLIED BY THE LOWER COURT.

II. WHETHER THERE WAS A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY WAS INSTRUCTED AS TO FELONY MURDER BUT WAS NOT INSTRUCTED ON THE ELEMENTS OF THE NAMED FELONIES AND WHETHER THE CIRCUIT COURT'S RESOLUTION OF THESE ISSUES CONFLICTS WITH A DECISION OF THIS COURT WHERE THE PETITIONER WAS NOT CONVICTED OF FELONY MURDER AND THE CLAIM IS A PARASITIC DERIVATION OF THE FIRST CLAIM PRESENTED HEREIN.

III. WHETHER THE APPLICATION OF THE AGGRAVATING CIRCUMSTANCE "ARREST AVOIDANCE" REFLECTS SUCH A BROAD AND VAGUE CONSTRUCTION THAT IT VIOLATES THE EIGHTH AMENDMENT AND WHETHER THE INSTANT DECISION IS IN CONFLICT WITH THE DECISION OF THIS COURT IN SPITE OF THE FACT THAT THE SUPREME COURT OF FLORIDA IS THE ULTIMATE AUTHORITY ON FLORIDA LAW AND FEDERAL

COURTS DO NOT SIT TO QUESTION ITS INTERPRETATION OF THAT STATE'S STATUTES.

IV. WHETHER THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO ADDRESS THE ISSUE OF WHETHER JURY INSTRUCTIONS MUST ELUCIDATE MERCY AS A LEGITIMATE SENTENCING CRITERIA WHERE THIS COURT HAS ON NUMEROUS OCCASIONS DENIED SUCH PETITIONS AND WHERE, IN THE PRESENT CASE, THE ISSUE IS NOT EVEN SQUARELY BEFORE THE COURT AND THE ISSUE IS DECIDED CORRECTLY BELOW.

V. WHETHER THE PETITIONER WAS IMPROPERLY DENIED AN EVIDENTIARY HEARING ON HIS INCOMPETENCE TO STAND TRIAL AND INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN CONFLICT WITH DECISIONS OF THIS COURT WHERE THE PETITIONER FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE TO CREATE A REAL, SUBSTANTIAL AND LEGITIMATE DOUBT AS TO HIS MENTAL CAPACITY TO MEANINGFULLY PARTICIPATE AND COOPERATE WITH COUNSEL AND WHERE THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM COULD BE SUMMARILY DETERMINED ON THE BASIS OF EITHER LACK OF PREJUDICE OR AS A MATTER OF LAW.

VI. WHETHER LACK OF MERIT IS CONCLUSIVELY DEMONSTRATED AS TO THE MULTITUDE OF ISSUES CONTAINED IN THE PETITION FOR WRIT OF CERTIORARI WHERE THE INSTANT PETITION TOTALS SEVENTY PAGES AND CONSTITUTES A BRIEF ON THE MERITS IN DEROGATION OF ALL RULES OF THIS COURT.

LIST OF PARTIES TO PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties.

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Reasons for denying the writ

I. This Court's own prior decision in Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), is controlling and was properly applied by the lower court and the decision below gave full consideration to the issue and decided it correctly so that the petitioner's conviction and sentence of death is not predicated upon a nonexistent or unconstitutional crime..... 2,3

II. The contention that the jury was not instructed on the elements of the named felonies in violation of the eighth and fourteenth amendments presupposes that the petitioner was convicted of felony murder and is a parisitic derivation of the first claim presented herein and the issue is not sufficiently important to warrant this court's attention. 3,4

III. The Supreme Court of Florida is the ultimate authority on Florida law and federal courts do not sit to question its interpretation of that state's statutes and in a capital punishment case where the state courts have acted through a properly drawn statute with appropriate standards to guide discretion, federal courts should not undertake a case-by-case comparison of the facts in the given case with the decisions of the state supreme court.. 4,5

IV. This court has on numerous occasions denied petitions for writ of certiorari to address the issue of whether jury instructions must elucidate mercy as a legitimate sentencing criteria and should deny certiorari in the present case for the reason that the issue is not squarely before the court and was decided correctly below. 5,6

V. The petitioner failed to present clear and convincing evidence to create a real, substantial and legitimate doubt as to his mental capacity to meaningfully participate and cooperate with counsel which would entitle him to an evidentiary hearing on the claim of mental incompetency at the time of trial and sentencing and his claim of ineffective assistance of counsel could be summarily determined on the basis of either lack of prejudice or as a matter of law. 6

VI. The instant petition for writ of certiorari, excluding the subject index, table of authorities, verbatim quotations and the appendix exceeds thirty pages in length, actually totaling seventy pages and constitutes, in actuality, a brief on the merits in derogation of all rules of this Court and a decided lack of merit is conclusively demonstrated

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STATEMENT OF THE FACTS

Respondents reject the statement of the case as set forth by petitioner as too inclusive. Respondents, therefore, will refer to pertinent facts within each topic.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THIS COURT'S OWN PRIOR DECISION IN STROMBERG V. CALIFORNIA, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) IS CONTROLLING AND WAS PROPERLY APPLIED BY THE LOWER COURT AND THE DECISION BELOW GAVE FULL CONSIDERATION TO THE ISSUE AND DECIDED IT CORRECTLY SO THAT THE PETITIONER'S CONVICTION AND SENTENCE OF DEATH IS NOT PREDICATED UPON A NONEXISTENT OR UNCONSITUTIONAL CRIME.

Stromberg v. California, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), states simply that if it is "impossible" to say on which ground the verdict rests, the conviction must be reversed. After reviewing the transcript of the trial, particularly the closing arguments at the guilt-innocence phase and the trial court's instructions, the lower court concluded that the record left no uncertainty that the ground on which the verdict rested was that of premeditated murder. Reversal is not mandated on the basis of an instruction to the jury as to the statutory definitions during the guilt-innocence proceedings listing felony murder as killing during the commission of certain crimes including "the abominable and detestable crime against nature" which had been declared unconstitutional before the petitioner's trial. This is especially true because: (1) the jurors were actually instructed in a later controlling charge to consider only premeditated murder as murder in the first-degree; (2) a felony-murder theory was not advanced at trial; (3) the closing arguments of both the state and the petitioner focused on premeditation to the complete exclusion of felony murder and (4) the indictment charging only premeditated murder was submitted to the jurors along with all of the evidence for use in their deliberations. 767 F.2d at 1362, 1363. Petitioner simply quarrels with the record below and asks this Court to sit as a super appellate tribunal. What has been presented to this Court is a brief on the merits. The state will not so engage this Court and it will suffice to say that the conclusions of the lower federal courts were fully supported by the record and the petitioner is not entitled to endless review. "The cases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court

uncertain as to the actual ground on which the jury's decision rested." Zant v. Stephens, 103 S.Ct. 2733, 2745 (1983). Moreover, the present case raised none of the concerns underlying the holding in Stromberg as the state did not base its prosecution, even in part, on a charge that constitutionally protected activity is unlawful. Sexual battery is hardly constitutionally protected activity in Florida and even accepting as true petitioner's specious claim that the record was replete with a sexual theme, then the jury had a basis for convicting for acts within the purview of felony murder notwithstanding a vague jury instruction. This Court has clearly laid this issue to rest in Zant v. Stephens, supra. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), is totally inapposite to the present case in which Adams intended to kill or employ lethal force and did kill, acting alone.

II. THE CONTENTION THAT THE JURY WAS NOT INSTRUCTED ON THE ELEMENTS OF THE NAMED FELONIES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS PRESUPPOSES THAT THE PETITIONER WAS CONVICTED OF FELONY MURDER AND IS A PARISITIC DERIVATION OF THE FIRST CLAIM PRESENTED HEREIN AND THE ISSUE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

In reviewing this claim, the Eleventh Circuit Court of Appeals determined that failing to inform the jury as to the elements of the felonies incorrectly mentioned, but not charged in the indictment, and not considered or found by the jury does not constitute reversible error. 764 F.2d 1364. Consideration of this claim is unnecessary as it is derived from the first issue presented herein, and erroneously presupposes that the petitioner was convicted of felony murder against all evidence and factual findings below. Moreover, this claim cannot survive petitioner's own argument in the first issue presented herein, that there was sufficient evidence of the underlying felonies to the degree that it cannot be ascertained whether the verdict rested on a basis of premeditated murder or felony murder. If a felony murder conviction, as the petitioner contends, could have been sustained upon sufficient evidence, then the possi-

bility that the jury might have reached a different verdict pursuant to additional instructions is too speculative to justify the conclusion that constitutional error was committed. See, Henderson v. Kibbe, 431 U.S. 145, 157, 97 S.Ct. 1730, 1738, 52 L.Ed.2d 203 (1977). The petitioner merely seeks review of inconsistent and unsupported claims.

III. THE SUPREME COURT OF FLORIDA IS THE ULTIMATE AUTHORITY ON FLORIDA LAW AND FEDERAL COURTS DO NOT SIT TO QUESTION ITS INTERPRETATION OF THAT STATE'S STATUTES AND IN A CAPITAL PUNISHMENT CASE WHERE THE STATE COURTS HAVE ACTED THROUGH A PROPERLY DRAWN STATUTE WITH APPROPRIATE STANDARDS TO GUIDE DISCRETION, FEDERAL COURTS SHOULD NOT UNDERTAKE A CASE-BY-CASE COMPARISON OF THE FACTS IN THE GIVEN CASE WITH THE DECISIONS OF THE STATE SUPREME COURT.

State supreme court interpretations of state law are not subject to second-guessing in the federal courts, even if the federal court differs in its interpretation of the requirements of the state's law. Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256 (1948). While the petitioner characterizes this contention as the Florida Supreme Court's failure to apply a consistent standard of review, he is simply quarreling with the state court. The state court, however, has acted through a properly drawn statute with appropriate standards to guide discretion and a case-by-case comparison of the facts in other cases is inappropriate. Proffitt v. Florida, 428 U.S. 242, 258-59, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976). In the present case, however, an error of state law has not even occurred.

Like this case, Doyle v. State, 460 So.2d 353 (Fla. 1984), involves sexual battery and murder of a victim who knew the defendant. The trial court found as aggravating factors, that the murder was committed both in the course of a sexual battery and in order to avoid lawful arrest. The Florida Supreme Court, however, held that the state had not proved that the murder was committed to avoid a lawful arrest beyond a reasonable doubt, as the evidence did not rule out the possibility that the murder of the rape victim was the culmination of the same hostile-aggressive impulses which triggered the initial attack. However,

under the facts of the present case, the victim's death resulted from a reasoned act, motivated by a desire to avoid detection and arrest. The petitioner's own written confession states that he put his hand over the victim's mouth to silence her screaming and she quit breathing. Moreover, unlike Doyle, the present case involves the charge of kidnapping as well as rape. The kidnapping involved transportation of the victim from one location to another and entailed the commission of deliberate acts to avoid detection. These acts resulted in the victim's death. Thus, it can hardly be said in the present case that the manual strangulation was an integral part of the attempted rape of the victim. 764 F.2d at 1365-1366.

IV. THIS COURT HAS ON NUMEROUS OCCASIONS DENIED PETITIONS FOR WRIT OF CERTIORARI TO ADDRESS THE ISSUE OF WHETHER JURY INSTRUCTIONS MUST ELUCIDATE MERCY AS A LEGITIMATE SENTENCING CRITERIA AND SHOULD DENY CERTIORARI IN THE PRESENT CASE FOR THE REASON THAT THE ISSUE IS NOT SQUARELY BEFORE THE COURT AND WAS DECIDED CORRECTLY BELOW.

On numerous occasions this Court has denied petitions for a writ of certiorari to address the issue of whether jury instructions must elucidate mercy as a legitimate sentencing criteria. See, Teague v. Tennessee, 105 S.Ct. 3538 (1985); White v. Maryland, 105 S.Ct. 1779, 84 L.Ed.2d 837 (1985); Maxwell v. Pennsylvania, 105 S.Ct. 370, (1984); Stebbing v. Maryland, 105 S.Ct. 276, 83 L.Ed.2d 212 (1984). The same result should obtain in the present case as the issue is not even squarely before the Court, in the first instance. In footnote 39 of the petition for writ of certiorari, the petitioner, himself, recognizes that the claim was not considered directly on the merits below, but was presented as an ineffective assistance of counsel claim. Presented in such a vein, this Court's decision in Strickland v. Washington, 104 S.Ct. 2052 (1984), controls and the petitioner has not shown a reasonable probability that, absent the error, the sentencer--including an appellate court, to the extent it independently reviews the evidence-- would have concluded that the balance of aggravating

and mitigating factors did not warrant death. The Strickland decisison itself involves a balancing of aggravating and mitigating factors to determine if death is warranted.

In Proffitt v. Wainwright, 756 F.2d 1500 (11th Cir. 1985), Proffitt complained, likewise, of a jury instruction which allegedly did not specifically instruct on the jury's freedom to exercise mercy, although there was no objections to the instructions at trial. This claim was barred for failure to object. The court noted, however, that "a rational conclusion is that the jury did not perceive a restriction on the use of any mitigating evidence." Prior cases have invalidated jury instructions which neither discuss mercy nor make any mention of mitigating circumstances at all. 756 F.2d at 1504, n.5. Moreover, conflict cannot be predicated upon Georgia cases, where the sentencer is the jury, and not the judge as in the state of Florida.

Nevertheless, in resolving the ineffective assistance of counsel claim, the Eleventh Circuit Court of Appeals found that the sentencing instructions given in this case "encompassed the broadest exercise of a jury's discretion in mercifully recommending a life sentence", even in comparison to sentencing schemes and jury instructions in other jurisdictions. 764 F.2d at 1369. The petitioner merely quarrels with the decisions of the trial judge and the Florida Supreme Court on independent review that he was not to be the subject of the exercise of such discretion.

V. THE PETITIONER FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE TO CREATE A REAL, SUBSTANTIAL AND LEGITIMATE DOUBT AS TO HIS MENTAL CAPACITY TO MEANINGFULLY PARTICIPATE AND COOPERATE WITH COUNSEL WHICH WOULD ENTITLE HIM TO AN EVIDENTIARY HEARING ON THE CLAIM OF MENTAL INCOMPETENCY AT THE TIME OF TRIAL AND SENTENCING AND HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL COULD BE SUMMARILY DETERMINED ON THE BASIS OF EITHER LACK OF PREJUDICE OR AS A MATTER OF LAW.

Armed only with a present diagnoses of catathymic amnesia, the petitioner could hardly hope to raise a real, substantial and legitimate doubt as to his competency to stand

trial and be sentenced so as to entitle him to an evidentiary hearing. Thus, the district court below lacked the power to receive evidence and try the facts anew, as the petitioner did not allege facts which, if proved, would entitle him to relief pursuant to this Court's decision in Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). The lower court determined, and properly so, that "the right not to be tried and sentenced unless mentally competent does not extend so far as to ensure total recall." 764 F.2d at 1361. The petitioner cannot possibly contend that he created on appeal below an unresolved issue of fact concerning the results of his post-trial psychological examination when the state's assertion that these results do not speak to the petitioner's competency at the time of trial and sentencing stands unrebutted. 764 F.2d at 1367 n.14.

In Strickland v. Washington, supra, this Court described the inquiry as "a mixed question of law and fact." 104 S.Ct. at 2070. Thus, in the context of petitioner's ineffective assistance of counsel claims, the need for an evidentiary hearing did not arise, as there was no genuine dispute as to the underlying operative facts.

VI. THE INSTANT PETITION FOR WRIT OF CERTIORARI, EXCLUDING THE SUBJECT INDEX, TABLE OF AUTHORITIES, VERBATIM QUOTATIONS AND THE APPENDIX EXCEEDS THIRTY PAGES IN LENGTH, ACTUALLY TOTALING SEVENTY PAGES AND CONSTITUTES, IN ACTULITY, A BRIEF ON THE MERITS IN DEROGATION OF ALL RULES OF THIS COURT AND A DECIDED LACK OF MERIT IS CONCLUSIVELY DEMONSTRATED THEREBY AS TO THE MULTITUDE OF ISSUES CONTAINED IN THE PETITION.

Pursuant to Supreme Court Rule 21.4, a petition for certiorari shall be as short as possible, but may not exceed thirty pages, excluding the subject index, table of authorities, any verbatim quotations required by subparagraph 1 (f) of the Rule, and the appendix. The petitioner has far exeeded the bounds of a jurisdictional brief and has submitted to this Court, in lieu thereof, a full blown brief on the merits. The couching of the issues herein, and the phrasing of the arguments are designed not to pursuade the Court to grant a

writ of certiorari, but to win arguments yet to be entertained by this Court. The state has not responded in kind, but has observed the rules of this Court and has attempted to narrow the issues within an acceptable number of pages. Obviously, the respondents cannot respond to every statement and nuance. It is the respondents' position, therefore, that ambiguities and areas of question must be resolved in the respondents' favor and that by such shotgun approach, the petitioner has conclusively failed to demonstrate cert-worthiness as to the issues raised herein.

CONCLUSION

Respondents respectfully submit that the questions presented for review by this Court fail to demonstrate that review is necessary or that substantial federal questions are involved. To the extent that this Court may conclude otherwise, the State of Florida submits that the decision rendered by the Circuit Court of Appeals for the Eleventh Circuit in this cause is clearly correct; that this Court should deny plenary review; and, that it should summarily affirm the decision of the Circuit Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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COUNSEL FOR RESPONDENTS

Latimer, 511 F.2d 498, 503 (10th Cir.1975). The court sustained the defense's objection. Devous now contends that this was not enough, that the court should have granted a mistrial *sua sponte*. We disagree. Taken in context, the prosecutor was replying to the defense's insinuation in closing argument that Velikaneye should not have been given immunity, R.Supp. Vol. III at 536, by explaining that she had been given immunity because there was sufficient corroborating evidence to support what she was saying. *Cf. United States v. Young*, *supra*. The prosecutor's remarks about what he believed were on the border. Defense counsel's objection to those remarks was sustained. The trial court's action was proper and sufficient to avoid prejudice to the defendant.

[9] Devous contends that the court's instructions to the jury were confusing and incomplete, in that the court did not instruct the jury that the defendant's distribution of Demerol was "outside the course of his professional practice." This contention is incorrect; the court did instruct on this element by reference to the indictment, the full text of which was read to the jury as part of the instructions. R.Supp. Vol. IV at 551. Furthermore, the instructions, although complex, were not unduly confusing. We hold that the instructions were complete and adequately covered each element of the crimes charged.

[10, 11] Devous also contends that the evidence was insufficient to convict him on any of the three counts and that the trial court therefore erred in failing to grant his motions for acquittal. The substance of this contention is that the prosecution did not establish that the Demerol involved was not being used for legitimate medical purposes, or that it had been obtained fraudulently. We disagree. There was ample evidence presented that the Demerol was being used for recreational purposes, and that the final purchase of 40 bottles was effected through a false representation that the drugs were needed for a visiting doctor from Salt Lake City.

AFFIRMED.

Aubrey Dennis ADAMS, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, and Jim Smith, Respondents-Appellees.

No. 84-3646.

United States Court of Appeals, Eleventh Circuit.

June 17, 1986.

Habeas corpus petitioner appealed from an order of the United States District Court for the Middle District of Florida, John H. Moore, II, J., denying his petition. The Court of Appeals, Johnson, Circuit Judge, held that: (1) procedural default rule would not operate to preclude petitioner, who failed to request a competency hearing at trial or pursue a claim of incompetency on direct appeal, from pursuing claim of mental incompetency in federal habeas corpus proceeding; (2) petitioner presented insufficient evidence of mental incompetence at time of trial and sentencing to warrant evidentiary hearing; (3) record reflected certainty that conviction was for premeditated murder, and not felony-murder, which was not alleged but was referred to early in instructions as part of what were, in essence, statutory definitions; (4) failure to instruct as to elements of underlying felonies after instructing on felony-murder was not so prejudicial that the penalty ultimately imposed violated petitioner's due process rights; (5) trial court was not precluded from finding aggravating factor of murder committed for purpose of avoiding arrest by also finding as an aggravating factor that murder was committed during commission of or attempt to commit rape or kidnapping; and (6) none of claims of ineffective assistance of counsel warranted habeas corpus relief.

Affirmed.

1. Habeas Corpus ⇐45.3(1.40)

Procedural default rule would not operate to preclude defendant who failed to

request a competency
pursue a claim of inc
appeal from pursuing
competency in federal
ceeding.

2. Mental Health ⇐4

Legal test for m
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whether defendant had
factual understandin
against him.

3. Constitutional Law

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evidence to create a r
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4. Habeas Corpus ⇐8

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therefore, that he was
evidentiary hearing.

5. Criminal Law ⇐625

Defense attorney's
sentencing report to eff
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mental competency to
would entitle him to an
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to have no recall of hi
crime and yet fairly u
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ly with his defense.

6. Habeas Corpus ⇐90

Recent psychologic
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petitioner's competency
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y Dennis ADAMS,
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v.

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espondents-Appellees.

No. 84-3646.

tes Court of Appeals,
venth Circuit.

ine 17, 1985.

rpus petitioner appealed
f the United States District
Middle District of Florida,
II, J., denying his petition.
Appeals, Johnson, Circuit
t: (1) procedural default
perate to preclude petition-
to request a competency
r pursue a claim of incom-
t appeal, from pursuing
incompetency in federal
roceeding; (2) petitioner
cient evidence of mental
time of trial and sentenc-
evidentiary hearing; (3)
certainty that conviction
ated murder, and not felo-
was not alleged but was
in instructions as part of
sence, statutory defini-
o instruct as to elements
nies after instructing on
s not so prejudicial that
tely imposed violated pe-
ess rights; (5) trial court
from finding aggravat-
der committed for pur-
rrest by also finding as
actor that murder was
commission of or at-
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of ineffective assistance
ed habeas corpus relief.

⇐45.3(1.40)

sult rule would not op-
efendant who failed to

request a competency hearing at trial or pursue a claim of incompetency on direct appeal from pursuing claim of mental incompetency in federal habeas corpus proceeding.

2. Mental Health ⇐434

Legal test for mental competency is whether, at time of trial and sentencing, defendant had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether defendant had a rational as well as factual understanding of proceedings against him.

3. Constitutional Law ⇐268.2(2)

As a matter of procedural due process, a criminal defendant is entitled to an evidentiary hearing on claim of mental incompetency if he presents clear and convincing evidence to create a real, substantial and legitimate doubt as to his mental capacity to meaningfully participate and cooperate with counsel.

4. Habeas Corpus ⇐85.5(2)

Failure to raise mental competency issue during trial or sentencing was persuasive evidence that habeas petitioner's mental competence was not in doubt and, therefore, that he was not entitled to an evidentiary hearing.

5. Criminal Law ⇐625

Defense attorney's statement in presentencing report to effect that habeas petitioner was unable to recall details of killing did not serve to raise a real, substantial, and legitimate doubt as to petitioner's mental competency to stand trial which would entitle him to an evidentiary hearing, since it would be possible for a defendant to have no recall of his involvement in a crime and yet fairly understand proceedings against him and cooperate meaningfully with his defense.

6. Habeas Corpus ⇐90.2(5)

Recent psychological evaluation diagnosing habeas corpus petitioner as suffering from catathymic amnesia failed to raise real, substantial, and legitimate doubt as to petitioner's competency to stand trial and be sentenced, and thus did not entitle petitioner to an evidentiary hearing, since the new psychological evaluation reflected only petitioner's present condition and shed little light on his condition at time of trial and sentencing.

7. Homicide ⇐345

Record reflected certainty that conviction on general jury verdict simply finding defendant guilty of first-degree murder was for premeditated murder, and not for felony-murder, which was never alleged but was referred to early in instructions as part of what were, in essence, statutory definitions.

8. Homicide ⇐340(4)

Where record reflected certainty that conviction was for premeditated murder and not felony-murder, instruction that was incomplete in failing to define elements of underlying felonies following instruction on felony-murder did not deprive defendant of his right to have a fully informed jury decide guilt or innocence.

9. Constitutional Law ⇐270(1)

Jury instruction at sentencing phase of capital trial that was incomplete for failure to define elements of felonies listed as possible aggravating factors to be considered in reaching an advisory verdict did not so infect entire sentencing proceeding that penalty ultimately imposed violated defendant's due process rights.

10. Criminal Law ⇐992

Under Florida law, a jury's advisory verdict recommending life imprisonment in a capital prosecution establishes an important set of parameters beyond which trial judge may exercise his discretion in reaching a sentence of death only if facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ.

11. Homicide ⇐354

Where underlying felony of kidnapping involved transportation of victim from one location to another and entailed commission of deliberate acts to avoid detection that resulted in victim's death, trial court was not precluded from finding as an aggravating factor that defendant had killed victim

in order to avoid or prevent his arrest by also finding as an aggravating factor that victim was killed during commission of kidnapping.

12. Habeas Corpus ⇐25.1(6)

None of petitioner's claims of ineffective assistance of counsel, including, inter alia, failure to adequately investigate competency to stand trial or be sentenced, failure to object to trial instruction on lesser degrees of homicide for which no evidence had been presented, failure to present in mitigation evidence of mental condition at time of murder and failure to object to sentencing instructions, involved both professional conduct that was unreasonable under circumstances and reasonable probability that, but for challenged conduct, result would have been different, warranting denial of habeas corpus relief. U.S.C.A. Const.Amend. 6.

Kenneth R. Hart, Timothy B. Elliott, Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, Fla., for petitioner-appellant.

Margene A. Roper, Asst. Atty. Gen., Port Orange, Fla., for respondents-appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY, FAY and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

Petitioner, Aubrey Dennis Adams, was convicted of first degree murder in a Florida court in 1978. Following the jury's recommendation, the trial judge imposed the death sentence. Direct appeals proved unsuccessful, *Adams v. State*, 412 So.2d 850 (Fla.), *cert. denied*, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982), as have subsequent petitions in state court seeking post-conviction and habeas corpus relief. *Adams v. State*, 456 So.2d 888 (Fla.1984). This is an appeal from the district court's denial of the petitioner's federal habeas petition. *Adams v. Wainwright*, No. 84-170-Civ-Oc-18 (M.D.Fla. Sept. 18, 1984). We affirm.

I. FACTS

In March 1978, the body of an eight year old girl was discovered in a remote wooded area near Ocala, Florida. The petitioner's conviction for the young girl's murder was based on circumstantial evidence and incriminating statements he made to investigating officers. Physical evidence found near the body was similar to evidence found in the petitioner's home and automobile. In a written statement, the petitioner admitted that he had offered the victim a ride home from school, she had accepted, and he had driven in another direction. The petitioner remembered "being stopped somewhere and she was screaming and I put my hand over her mouth and she quit breathing." Verbally, the petitioner admitted removing the victim's clothes, using rope to tie her hands, and placing plastic bags over her body. When asked if he had any type of sexual relations with the victim, the petitioner said he thought he had tried but could not do it or could not bring himself to do it. The testimony of the officers indicates that the petitioner had difficulty remembering the details of the killing when questioned.

II. ISSUES AND DISCUSSION

A. The Petitioner's Mental Competence to Stand Trial and be Sentenced.

The trial court granted a pretrial motion by the defense for an order allowing a private psychiatrist to enter the petitioner's prison and examine him. In a subsequent pretrial hearing on the State's motion for a separate psychological examination, the petitioner's attorney asserted that he knew of no evidence having been presented to the court to suggest incompetency and that, absent such evidence, it would be improper for the court to order an additional examination. The State's motion was denied. The petitioner did not claim mental incompetency or allege an insanity defense at trial. In the presentence report, however, the defense attorney is attributed with the statement that the petitioner had been unable to recall the details of the crime and this had impaired the petitioner's assistance in his defense. Moreover, the petitioner now proffers a psychological evalua-

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On motion for post-conviction relief, the
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had failed to argue the claim in direct
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Cruz v. State, 437 So.2d 1388 (Fla.1983).
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as mentally incompetent at the time of
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The district court below similarly denied
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oubt as to the petitioner's mental compe-
nce and thereby establish his entitlement
a competency hearing. Again, no evi-
entiary hearing was held. Instead, the
istrict court relied solely on the trial tran-
cript and other documentary evidence.

[1] 1. *Procedural Default.* Binding precedent fully supports the petitioner's contention that the procedural default rule of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), does not operate to preclude a defendant who failed to request a competency hearing at trial or pursue a claim of incompetency on direct appeal from contesting his competency to stand trial and be sentenced through post-conviction proceedings. *See Zapata v. Estelle*, 588 F.2d 1017, 1021 (5th Cir.1979); *Nathaniel v. Estelle*, 493 F.2d 794, 798 (5th Cir.1974); *Bruce v. Estelle*, 483 F.2d 1031, 1037 (5th Cir.1973). Indeed, as the Supreme Court stated in *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.* at 384, 86 S.Ct. at 841; *Zapata v. Estelle*, *supra*, 588 F.2d at 1021; *Bruce v. Estelle*, *supra*, 483 F.2d at 1037. Therefore, the district court below erred in holding that the petitioner was procedurally barred from pursuing a claim of mental incompetency in a federal habeas corpus proceeding.

The district court's opinion attempts to distinguish *Pate v. Robinson* on factual grounds, noting that Robinson's sanity had been "very much at issue" throughout the criminal proceedings against him, while the petitioner in this case considered but rejected proffering an insanity plea. This factual difference does exist, but the district court's reasoning pretermits the initial conclusion in *Pate v. Robinson* and ignores subsequent decisions in this Circuit. The Supreme Court in *Pate v. Robinson* first reasoned that one who is incompetent cannot waive his right to a competency hearing. The secondary basis for its holding was that, "[i]n any event," waiver had not actually occurred because Robinson had made his sanity an issue throughout his trial. *Pate v. Robinson*, *supra*, 383 U.S. at 384, 86 S.Ct. at 841. Later decisions in this Circuit have applied the initial rationale of *Pate v. Robinson* in such a manner as to obviate the need for any inquiry into whether a convicted defendant who is alleging mental incompetency actually waived his right to a competency hearing at the time of his trial. These decisions have squarely held that waiver cannot occur. *See Zapata v. Estelle*, *supra*, 588 F.2d at 1021; *Nathaniel v. Estelle*, *supra*, 493 F.2d at 798; *Bruce v. Estelle*, *supra*, 483 F.2d at 1037.

[2, 3] 2. *Evidence of Mental Incompetence.* Although the petitioner is not procedurally barred in these habeas proceedings from challenging his mental competency, he is not automatically entitled to a hearing on this claim.[1] The legal test for

1. Nor is the petitioner automatically entitled to a hearing on his claim that his attorney rendered ineffective assistance by not fully investi-

mental competency is whether, at the time of trial and sentencing, the petitioner had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and whether he had "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). As a matter of procedural due process, a criminal defendant is entitled to an evidentiary hearing on his claim of incompetency if he presents clear and convincing evidence to create a "real, substantial and legitimate doubt as to [his] mental capacity ... to meaningfully participate and cooperate with counsel...." *Bruce v. Estelle*, *supra*, 483 F.2d at 1043; *see also Zapata v. Estelle*, *supra*, 588 F.2d at 1021-22; *Nathaniel v. Estelle*, *supra*, 498 F.2d at 798. The standard of proof is high. The facts must "positively, unequivocally and clearly generate" the legitimate doubt. *Bruce v. Estelle*, *supra*, 483 F.2d at 1043; *see also Pride v. Estelle*, 649 F.2d 324, 326 (5th Cir.1981) (requiring "more than a showing by a preponderance of the evidence" that the petitioner might have been incompetent at the time of the state trial).

The district court below found that the petitioner had not presented sufficient evidence to create a "real, substantial, and legitimate doubt" as to his mental competence to stand trial and be sentenced. Therefore, he was not entitled to an evidentiary hearing. In reaching this conclusion, the district court considered the trial transcript and other supporting documents. No live testimony was taken. Our review of findings based on such a record is, nevertheless, constrained by the usual strictures of the clearly erroneous standard. *Anderson v. Bessemer City*, — U.S. —, —, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985); *see Dothan Coca-Cola Bottling Co. v. United States*, 745 F.2d 1400, 1402-04 (11th Cir.1984) (choosing the clearly erroneous standard where the lower court considered only transcript of prior trial and other documentary evidence). Under the proper standard of review, we agree with the finding of the district court, though not with its reasoning entirely.

[4] In finding that the petitioner had failed to raise a real, substantial, and legitimate doubt as to his competency to stand trial, the district court noted the statement made by the petitioner's attorney at the pretrial hearing that he then knew of no evidence to suggest the petitioner was incompetent. This statement was made, but its importance is limited by the context. As of the date of the hearing, the psychological testing of the petitioner was not sufficiently complete for the attorney to conclude that no claim of incompetency would be raised. Indeed, the transcript of the hearing clearly reflects that the attorney had not yet determined whether raising such a claim would be appropriate.[2] Therefore, the statement itself should be given little weight in deciding whether a doubt as to the petitioner's competency exists. By contrast, it is highly significant that the petitioner's counsel did not later claim during trial or sentencing that the petitioner was in fact incompetent. This failure to raise the competency issue is persuasive evidence that the petitioner's mental competence was not in doubt and therefore he is not entitled to an evidentiary hearing. *E.g., Reese v. Wainwright*, 600 F.2d 1085, 1092 (5th Cir.), *cert. denied*, 444 U.S. 983, 100 S.Ct. 487, 62 L.Ed.2d 410 (1979).

[5] The district court also criticized the "self-serving" nature of the statement attributed to the petitioner's attorney in the presentencing report to the effect that the petitioner's ability to assist with his defense had been limited because he could not recall the details of the killing. We are not persuaded by this conclusory line of reasoning. More important to our decision to affirm the district court's finding is the

gating his competency. *See infra* note 14 and accompanying text.

2. The petitioner's attorney stated at the hearing that the petitioner's family intended to engage a psychiatrist "to examine [the petitioner] prior to the filing of any suggestions of competency and sanity, if the same were appropriate."

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limited nature of the statement itself. The presentence report summarizes the attorney's remarks: "Prior [to] and during the trial, Dennis Adams could not remember and therefore could not provide information concerning the killing that would assist with his defense." The district court recognized in a footnote, and we agree, that this statement is quite different from a contention that the petitioner lacked the "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and lacked "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, *supra*, 362 U.S. at 402, 80 S.Ct. at 789. While a defendant's inability to remember his participation in a crime may have some bearing on whether he is mentally incompetent, it is possible for a defendant to have no recall of his involvement in a crime and yet fully understand the proceedings against him and cooperate meaningfully with his attorney in his defense. The right not to be tried and sentenced unless mentally competent does not extend so far as to ensure total recall.

[6] Finally, the district court below discounted the recent psychological evaluation diagnosing the petitioner as suffering from catathymic amnesia. As had the Florida Supreme Court on the petitioner's motion for post-conviction relief, the district court concluded that the new psychological evaluation reflected only the petitioner's present condition and shed little light on his condition at the time of trial and sentencing. On appeal, the petitioner argues that the evaluation is not limited in analysis to his present condition, but we find nothing in the record to support this contention. The evaluation does not even appear to have been made a part of the record on appeal, and thus we are unable to consider its content. We cannot say, then, that the district court's finding is erroneous. Having failed to raise a real, substantial, and legitimate doubt as to his competency to stand trial and be sentenced, the petitioner is not entitled to an evidentiary hearing on this claim.

B. The Felony-Murder Instruction at the Guilt-Innocence Phase.

The indictment charged the petitioner with premeditated murder. Felony murder was not alleged. However, the verbal charge given the jury during the guilt-innocence proceedings listed, as "murder in the first degree," both premeditated murder and felony murder, with the latter being defined as killing during the commission of, or an attempt to commit, "rape,[3] ... abominable and detestable crime against nature or kidnapping...." The Florida statute prohibiting abominable and detestable crimes against nature had been declared unconstitutional before the petitioner's trial. *Franklin v. State*, 257 So.2d 21 (Fla. 1971). The jury returned a general verdict finding the petitioner guilty of murder in the first degree, without specifying whether the crime was premeditated or whether it simply occurred while the petitioner was committing or attempting to commit one of the enumerated felonies.

In *Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), the Supreme Court held that a conviction cannot be upheld if (1) the jury was instructed that a guilty verdict could be returned with respect to any one of several listed grounds, (2) it is impossible to determine from the record on which ground the jury based the conviction, and (3) one of the listed grounds was constitutionally invalid. Citing *Stromberg*, the petitioner claims that the trial court's reference to an invalid crime, when coupled with the jury's general verdict, necessitates a reversal.[4]

3. The reference to rape here was in error, since the crime did not exist under Florida law. Had the felony-murder instruction been warranted in the first instance, the proper instruction would have referenced and defined sexual battery. *See Adams v. State*, *supra*, 412 So.2d at 852. However, because we hold that the jury considered and found the petitioner guilty only of premeditated murder, this error in the felony-murder definition was harmless.

4. The petitioner further claims that his attorney's failure to object to the trial court's instructions and the general form of the verdict constitutes ineffective assistance of counsel. Since we hold the substantive *Stromberg* claim to be with-

The Florida Supreme Court rejected this claim. Without citing *Stromberg*, the court engaged in a determination of whether the evidence was sufficient to support a finding of premeditated murder. The court held that, "[a]lthough an erroneous or uninvited felony murder instruction was given, the evidence of premeditation was sufficient to render the erroneous instruction harmless." *Adams v. State*, *supra*, 412 So.2d at 853.

The Florida Supreme Court's approach to deciding the petitioner's *Stromberg* claim was incorrect. The proper approach is to examine only the trial court's instructions and the jury's verdict, not the sufficiency of the evidence to support the verdict. *Stromberg* does not suggest a harmless error standard based on overwhelming evidence of guilt under the valid portion of the jury charge. Rather, *Stromberg* states simply that if it is "impossible" to say on which ground the verdict rests, the conviction must be reversed. *Stromberg v. California*, *supra*, 283 U.S. at 368, 51 S.Ct. at 535.

The district court below reiterated the Florida court's conclusion as to the sufficiency of the evidence before approaching this claim correctly by examining the jury instructions and the closing arguments made at trial and asking whether, under the circumstances, the jury could only have considered and found premeditated murder. The district court concluded that the record left no uncertainty as to the ground on which the verdict rested. That ground was premeditated murder. After reviewing the transcript of the trial, particularly the closing arguments at the guilt-innocence phase and the trial court's instructions, we agree.

[7] The trial court's reference to the capital felony of killing during the commission of or an attempt to commit rape, a crime against nature, or kidnapping as murder in the first degree appears early in the instructions as part of what were, in essence, statutory definitions.[8] The actual

out merit, the attorney's failure to object cannot be held to constitute ineffective assistance.

8. The trial court's instructions state, in relevant part:

> The Defendant, Aubrey Dennis Adams, Jr., is charged with the crime of first degree murder in that on January the 23rd, 1978, in Marion County, Florida, he did unlawfully, from a premeditated design to effect the death of Trisa Gail Thornley ... kill and murder Trisa Gail Thornley ... in violation of Florida Statute 782.04.
>
> The charge of premeditated murder includes the lesser charges of: One, second degree murder; two, third degree murder; and, three, manslaughter.
>
> The Defendant has entered his plea of not guilty. The effect of this plea is to require the State to prove each material allegation of the Indictment beyond and to the exclusion of every reasonable doubt before the Defendant may be found guilty.
>
> The killing of one human being by another is called homicide. Every homicide falls within one of these four classes: One, justifiable homicide; two, excusable homicide; three, murder in the first, second or third degree; and, four, manslaughter.
>
> The circumstances of each case determine whether a homicide is justifiable, excusable, murder or manslaughter.
>
> Justifiable homicide and excusable homicide are lawful; Murder and manslaughter are unlawful and constitute violations of the criminal laws.
>
> The essential elements of unlawful homicide, together with other matters that must be proved beyond and to the exclusion of every reasonable doubt before there can be a conviction in this case, are as follows: One, Trisa Gail Thornley is, in fact, dead; two, such death was caused by the criminal act or agency of another; and, three, the death was caused by the Defendant, Aubrey Dennis Adams, Jr.
>
> These four classes of homicide must now be defined to you so that you can properly understand them.
>
> The first class that I made reference to: The killing of a human being is justifiable homicide and lawful when...
>
> The second class: Excusable homicide is...
>
> Homicide is excusable and lawful if it is committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used....
>
> A sudden and sufficient provocation is...
>
> The heat of passion is...
>
> A dangerous weapon is...
>
> The third class: Murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or [illegible] human being.
>
> A premeditated design to kill is ...
>
> The question of premeditated design is a question of fact to be determined by the Jury...

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controlling charge came later in the ructions, when the trial court told the rs that, if the elements of homicide re found, their next task would be to rmine its degree. At this point, pre-itated murder was the only killing stat-to constitute murder in the first degree.[6] herefore, the jurors were actually in-tructed to consider only premeditated murder as murder in the first degree. hat their consideration was so limited is further evidenced by three significant facts: (1) a felony-murder theory was not advanced at trial, (2) the closing arguments of both the State and the petitioner focused on premeditation to the complete exclusion of felony murder,[7] and (3) the indictment charging only premeditated murder was submitted to the jurors along with all of the evidence for use in their deliberations. Under these circumstances, it is not impossible to determine on which ground the petitioner's conviction for first degree murder rests. The record reflects certainty that the conviction was for premeditated murder and not felony murder.

C. The Failure to Instruct as to the Elements of Underlying Felonies.

[8] After instructing the jury that killing during the commission of, or an attempt to commit, rape or kidnapping constituted murder in the first degree, the trial court failed to define the elements of these underlying felonies. The petitioner here contends that the incomplete instruction so infected the guilt-innocence phase of his trial as to violate due process, in that it deprived him of the right to have the jury decide whether each element of the crime had been proved beyond a reasonable doubt.[8] *See Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977); *cf. Glenn v. Dallman*, 686 F.2d

> The killing of a human being in committing, or attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree, even though there is no premeditated design or intent to kill.
>
> If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime, the killing is in the perpetration of or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree.

6. The listed felonies were only mentioned by reference in order to distinguish all other felonies as relevant to a finding of murder in the *third* degree:

> To summarize: The essential elements of an unlawful homicide which must be proved beyond a reasonable doubt in this case before there can be a conviction of any offense are as follows: One, that Trisa Gail Thornley is, in fact, dead; two, that the killing was wrongful and by the means stated in the Indictment; three, that Trisa Gail Thornley was killed by the Defendant; and, four, that the killing was neither justifiable or [sic] excusable homicide.
>
> If the elements are established, then it will be necessary for you to determine the degree of the unlawful homicide.
>
> *If the Defendant, in killing the deceased, acted from a premeditated design to effect the death of the deceased, or some other human being, he should be found guilty of murder in the first degree.* (emphasis added).
>
> If the killing was not from a premeditated design to effect the death of *any* human being, but was in the perpetration of an act imminently dangerous to another, evincing a depraved mind, regardless of human life, the Defendant should be found guilty of murder in the second degree.
>
> If the killing took place while the Defendant was engaged in the commission of a felony other than arson, rape, robbery, burglary, the *abominable and detestable crime against nature* or *kidnapping*, the Defendant should be found guilty of murder in the *third* degree. (emphasis added).
>
> If the killing was by the act, procurement or culpable negligence of the Defendant and was not murder in any degree or justifiable or excusable homicide, the Defendant should be found guilty of manslaughter.
>
> Of course, if any one of the essential elements of any unlawful homicide has not been proved beyond a reasonable doubt, the Defendant should be found not guilty.

7. Both the prosecuting attorney and the petitioner's attorney equated first degree murder with premeditated murder for purposes of this trial.

8. The petitioner also raises an ineffective assistance of counsel claim based on his trial attorney's failure to objects to the incomplete charge. Since we hold the underlying claim to be without merit, the attorney's failure to object cannot constitute ineffective assistance.

418 (6th Cir.1982) (vacating a conviction where the trial court had omitted in its instructions an essential element of the only crime charged; harmless error rule held inapplicable). However, since we have already determined that the jury considered and found only premeditated murder, given the particular circumstances of this trial, the incomplete instruction did not deprive the petitioner of his right to have a fully informed jury decide guilt or innocence. The petitioner does not claim that the trial court improperly instructed the jury as to the necessary elements of proof for a finding of premeditated murder. Failing to inform the jury as to the elements of the felonies incorrectly mentioned but not charged in the indictment and not considered or found by the jury does not constitute reversible error.

An analogous claim is raised with respect to the trial court's instructions at the sentencing phase of the petitioner's trial. The instructions listed the statutory aggravating factors that the jury could properly consider in reaching an advisory verdict. One of the three aggravating factors was that the killing had occurred during the commission of, or an attempt to commit, rape or kidnapping. Again, however, the trial court did not define the elements of these felonies. The jury's advisory verdict recommended a sentence of death but did not specify which aggravating factor(s) a majority of the jurors found to exist beyond a reasonable doubt. The trial court later specifically found that three aggravating factors had been proved: (1) the murder had occurred during the commission of, or an attempt to commit, rape or kidnapping, (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest, and (3) the murder was especially heinous, atrocious, or cruel. *See* Fla. Stat. §§ 921.141(5)(d), (e), (h).

[9] We hold that the incomplete jury instruction did not so infect the entire sentencing proceeding that the penalty ultimately imposed violates the petitioner's due process rights. *See Henderson v. Kibbe, supra*, 431 U.S. at 154–55, 97 S.Ct. at 1736–37. However, we reject as a rationale for this holding the broad notion that the merely advisory role of the sentencing jury under Florida law renders any given error in a sentencing proceeding nonconstitutional in stature. This approach was recently noted but appropriately not followed by a panel of this Court in *Proffitt v. Wainwright*, 756 F.2d 1500, 1502 (11th Cir.1985) (citing *Spaziano v. Florida*, — U.S. —, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984)).

[10] The jury's role in an advisory sentencing proceeding is critical. A verdict recommending life imprisonment establishes an important set of parameters beyond which the trial judge may exercise his discretion in reaching a sentence of death only if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). Every error committed before the jury at a sentencing proceeding will have some *conceivable* effect on the jury's verdict and thus may affect the jury's determination of the guiding parameters for sentencing in the case. Every error in instruction which makes it less likely that the jury will recommend a life sentence to some degree deprives the defendant of the protections afforded by the presumption of correctness that attaches to a jury's verdict recommending life imprisonment. There may be a case in which a substantively incorrect instruction will mislead the jury to such an extent that the parameters created by the jury's verdict are so far off their proper mark that the instruction alone justifies reversal. An erroneous instruction may also provide convincing evidence that the trial judge himself misunderstood or misapplied the law when he later actually found and balanced aggravating and mitigating factors.

Not every error in instruction, however, will be so prejudicial as to require resentencing. An *incomplete* instruction is less likely to prejudice the defendant than one which is substantively incorrect. *See Henderson v. Kibbe, supra*, 431 U.S. at 155, 97 S.Ct. at 1737. The latter misstates the applicable law; the former is consistent with the applicable law but simply fails to

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1487, 1501 (11th Cir.1983)
law, and "[u]nder the facts
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D. The Aggravating F
Committed for the P
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As noted previously, o
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the Florida Supreme Cou
victim knew the petitione
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the petitioner had hidden

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Court relied upon in affirm
finding, is too ambiguous
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Florida law renders any
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pra, 431 U.S. at 155, 97
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set it forth in full detail. Moreover, a claim of prejudice is particularly remote where the defendant did not object to the instruction's lack of completeness when the opportunity arose. *Id.* Such is the status of the petitioner's claim here. The jury instruction at sentencing was not substantively erroneous, just incomplete. The petitioner's counsel did not object or move for further instructions. The evidence fully supports the trial court's finding that the murder occurred during the commission of, or an attempt to commit, rape and kidnapping. Under these circumstances, the possibility that the jury would have reached a different verdict and thereby altered the sentencing parameters "is too speculative to justify the conclusion that constitutional error was committed." *Id.* at 157, 97 S.Ct. at 1738; *cf. Westbrook v. Zant*, 704 F.2d 1487, 1501 (11th Cir.1983) (Under Georgia law, and "[u]nder the facts in this case, the trial court was required to do no more regarding the applicable statutory aggravating factors than to repeat the exact statutory language.").

D. The Aggravating Factor of Murder Committed for the Purpose of Avoiding Arrest.

As noted previously, one of the three statutory aggravating factors found by the trial court to justify imposing the death penalty was that the petitioner had killed the victim in order to avoid or prevent his arrest. *See* Fla.Stat. § 921.141(5)(e). The facts enumerated by the trial court in support of this finding were: (1) actual or attempted kidnapping and rape had been proven, implying that the petitioner had reason to fear arrest, and (2) the murder prevented the victim from later identifying the petitioner. In affirming the sentence, the Florida Supreme Court added: (1) the victim knew the petitioner and could have identified him if permitted to live, and (2) the petitioner had hidden the victim's body. *Adams v. State*, *supra*, 412 So.2d at 856. The district court below concluded: "The aggravating factor of avoiding arrest was not found in this case simply because the victim's body was hidden;[9] rather, the evidence supports the finding that death was preceded by kidnapping and rape and that the victim was murdered to prevent [the petitioner's] discovery and conviction for these felonies." *Adams v. Wainwright*, *supra*, No. 84-170-Civ.-Oc-16, Op. at 10-11.

Citing a recent Florida Supreme Court decision, *Doyle v. State*, 460 So.2d 353 (Fla. 1984), in which the court reversed a finding of this same aggravating factor in a rape-murder context, the petitioner asserts that no meaningful basis exists for distinguishing between cases involving a real avoidance motive for killing and cases not involving this motive. Without such a basis, argues the petitioner, the imposition of the death penalty in the present case, to the extent it is based on this aggravating factor, is arbitrary and hence unconstitutional. *See Godfrey v. Georgia*, 446 U.S. 420, 427-28, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980); *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976).

Like this case, *Doyle* involved sexual battery and murder of a victim who knew the defendant. The trial court found as aggravating factors that the murder was committed both in the course of sexual battery, *see* Fla.Stat. § 921.141(5)(d), and in order to avoid lawful arrest, *see* Fla.Stat. § 921.141(5)(e). In holding that the State had not proved the latter aggravating factor beyond a reasonable doubt, the Florida Supreme Court stated in *Doyle*: "It is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire

9. The petitioner's attempt to conceal the victim's body by placing it in plastic bags and depositing it in a remote area, a fact the Florida Supreme Court relied upon in affirming the trial court's finding, is too ambiguous to comprise a part of our rationale for holding that the State proved beyond a reasonable doubt that the petitioner committed the murder in order to avoid detection. Concealment of the body is as much evidence of an intent to avoid detection of the murder as it is evidence of an intent to avoid detection of actual or attempted rape and kidnapping.

to avoid detection." *Doyle v. State*, *supra*, 460 So.2d at 358. Based on this statement, the petitioner argues that the victim's death in this case resulted from an impulsive manual strangulation which was an integral part of the attempted rape of the victim and not a reasoned act motivated by a desire to avoid detection and arrest.

In essence, the petitioner's argument is that by finding the aggravating factor, killing during the commission of actual or attempted rape, a trial court is prevented from finding as an additional aggravating factor that the killing was motivated by a desire to avoid detection and prevent arrest. *Doyle*, however, did not hold that these two aggravating factors were mutually exclusive in every case involving both murder and rape. Indeed, the *Doyle* court implied otherwise by holding that, based on the facts in the record of that case, the State simply had not proven an avoidance motive beyond a reasonable doubt. The *Doyle* court rejected the State's attempt to prove this factor by drawing weak inferences from the victim's ability to identify the defendant as her rapist and from the likelihood that a five-year suspended sentence of the defendant for a prior offense would be reimposed if he were arrested and convicted of rape.[10] Thus, as we interpret *Doyle*, proof of murder while committing actual or attempted rape will not invariably preclude a finding that the defendant acted on a premeditated desire to kill in order to avoid detection and prevent arrest. The two aggravating factors can co-exist if both are proven beyond a reasonable doubt. Proof that the petitioner's reasoned acts in this case were motivated by a desire to avoid detection does not require an unacceptable reliance on inferences or assumptions. The petitioner's own written confession states that he put his hand over the victim's mouth to silence her screaming, and she quit breathing.

[11] Moreover, unlike *Doyle*, the present case involves a charge of kidnapping as well as rape. The type of hostile-aggressive impulses associated with rape are not as readily implicated in a kidnapping case. The rape and murder in *Doyle* occurred as part of a single incident of impulsive violence committed at one location. Under these circumstances, the court was appropriately skeptical of the State's attempt to infer an avoidance motive for killing from the simple fact that a rape had occurred. By contrast, the kidnapping here involved transportation of the victim from one location to another and entailed the commission of deliberate acts to avoid detection.[11] These acts resulted in the victim's death. Killing during the commission of kidnapping and killing motivated by a desire to avoid detection of the kidnapping can comprise separate aggravating factors in the same case.[12] *See, e.g., Stevens v.*

State, 419 So.2d 1058, 106
Card v. State, 453 So.2d 17, 2
denied, — U.S. —, 105
L.Ed.2d 330 (1984).

E. The Ineffective Assista
sel Claims.

[12] Finally, the petitioner
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claims,[13] alleging that his at
(1) to adequately investigate
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stand trial or be sentenced; (
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and, applying the test anno
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L.Ed.2d 674 (1984), we affirm
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of the claims involved both
conduct that was unreasonal
circumstances and a reasonab

10. *See also Rivers v. State*, 458 So.2d 762, 765 (Fla.1984) (requiring "direct evidence as to motive or at least very strong inference from the circumstances"); *Menendez v. State*, 368 So.2d 1278, 1282 (Fla.1979) (That murder weapon was fitted with a silencer, the purpose of which was to minimize detection, did not clearly show the dominant motive for killing was to avoid arrest by eliminating a witness to a robbery; where events preceding the actual killing are unknown, court will not assume defendant's motive; the burden was on the state to prove it.).

11. The jury verdict at the guilt-innocence phase of the trial is consistent with this conclusion since, as we have already held, the verdict rested solely on the jury's finding that the petitioner had murdered the victim in a premeditated fashion. *Cf. Rivers v. State*, *supra*, 458 So.2d at 765 (fact that jury found defendant guilty of felony murder, not premeditated murder, supported reversal of trial court's finding that the murder was committed for the purpose of avoiding lawful arrest).

12. We do not suggest, however, that in every case in which the State alleges and proves kidnapping in addition to rape the trial court can mechanically find, as an aggravating factor, killing in order to avoid detection and prevent arrest. Under a literal reading of Florida's criminal statutes, sexual battery will nearly always entail at least the possibility of a kidnapping charge. *See* Fla.Stat. § 787.01(1)(a)(2) (defining "kidnapping" to include forcibly confining another person against his or her will with intent to commit a felony); Fla.Stat. § 794.011 (defining sexual battery and establishing it as a felony). Yet proof of kidnapping in a sexual battery case will not necessarily enable the State to avoid the effect of the Florida Supreme Court's holding in *Doyle*. The evidence must also show conclusively, as it did here, that the defendant did not kill as the result of a single

aggressive and impulsive sexual
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detection and arrest existed. P
tive must be "very strong." *Ril*
So.2d 19, 22 (Fla.1978), *cert. d*
1138, 103 S.Ct. 773, 74 L.Ed.
Routly v. State, 440 So.2d 1257,

13. See also *supra* notes 4 and 8.

14. With respect to his attorney's
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Sain, 372 U.S. 293, 83 S.Ct. 74

...ate, 419 So.2d 1058, 1064 (Fla.1982); ...ard v. State, 453 So.2d 17, 24 (Fla.), cert. ...nied, — U.S. —, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

E. The Ineffective Assistance of Counsel Claims.

[12] Finally, the petitioner raises an array of ineffective assistance of counsel claims,[13] alleging that his attorney failed: (1) to adequately investigate and present evidence of his mental incompetency to stand trial or be sentenced; (2) to object to a jury instruction which listed lesser degrees of homicide for which no evidence had been presented; (3) to develop and present in mitigation evidence of his mental condition at the time of the murder; (4) to object to an instruction at sentencing which did not inform the jurors of their ability to recommend life imprisonment even though mitigating factors were outweighed by aggravating factors; (5) to object to an instruction at sentencing which listed aggravating factors not supported by any evidence; and (6) to object to an instruction at sentencing which omitted the statement that a tie vote among jurors would mandate a recommendation of life imprisonment. We have reviewed the portions of the record relevant to each of these claims, and, applying the test announced by the Supreme Court in *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we affirm the denial of habeas corpus relief on this ground. None of the claims involved both professional conduct that was unreasonable under the circumstances and a reasonable probability that, but for the challenged conduct, the result of the particular proceedings would have been different. *Id.* at —, 104 S.Ct. at 2064–69, 80 L.Ed.2d at 693–99. The claims were argued in a cursory fashion in the briefs of both parties and deserve only summary treatment here.

First, neither the scope of the investigation of the petitioner's mental competency nor his attorney's decision not to pursue a claim of incompetency prejudiced the outcome of the petitioner's case.[14] Before trial, the petitioner's attorney arranged for an examination of the petitioner by a private psychiatrist for the purpose of determining whether an insanity defense could be proffered. This examination uncovered no basis for an incompetency claim. The petitioner did have difficulty remembering certain details concerning the murder, but his ability to participate meaningfully in his defense was not in such doubt that further examinations should have been undertaken. As we have already held, it appears from the record on appeal that even the petitioner's post-trial examinations fail to raise a real, substantial, and legitimate doubt as to his mental competency at the time of trial. Since the requisite doubt has not and apparently could not have then been raised, the attorney's conduct in investigating and his decision not to pursue a claim of incompetency did not result in prejudice.

Second, the attorney's failure to object to the instruction listing lesser degrees of homicide, apart from possibly being reasonable trial strategy, similarly did not prejudice the outcome of the petitioner's trial.

aggressive and impulsive sexual desire, but rather that an independent reasoned motive to avoid detection and arrest existed. Proof of this motive must be "very strong." *Riley v. State*, 366 So.2d 19, 22 (Fla.1978), *cert. denied*, 459 U.S. 1138, 103 S.Ct. 773, 74 L.Ed.2d 985 (1983); *Mosely v. State*, 440 So.2d 1257, 1263 (Fla.1983).

13. See also *supra* notes 4 and 8.

14. With respect to his attorney's failure to pursue a claim of incompetency, the petitioner characterizes the ineffective assistance inquiry as purely factual, thereby hoping to obtain an evidentiary hearing as required in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). In *Strickland v. Washington*, however, the Supreme Court described the inquiry as "a mixed question of law and fact." — U.S. at —, 104 S.Ct. at 2070, 80 L.Ed.2d at 700. Thus, the need for an evidentiary hearing does not arise unless there exists a genuine dispute as to the underlying, operative facts. Here, what the petitioner's attorney did and did not do both in investigating and deciding not to pursue an incompetency claim are not genuinely in dispute. Nor has the petitioner created in this appeal an unresolved issue of fact concerning the results of his post-trial psychological examination. The State's assertion that these results do not speak to the petitioner's competency at the time of trial and sentencing stands unrebutted.

It would certainly have been reasonable for the attorney not to object and instead to hope that, if the jury returned a guilty verdict, this verdict would be based on one of the lesser degrees of homicide listed. In any event, no prejudice resulted from the inclusion of these lesser degree crimes as part of the instruction, and hence no prejudice resulted from the attorney's failure to object. In reaching this holding, we are aware that Florida's rules of criminal procedure have been altered since the date of the petitioner's trial to require a trial court to charge only on lesser degrees that are supported by the evidence. *See In re Florida Rules of Criminal Procedure*, 403 So.2d 979 (Fla.1981); Fla.R.Crim.P. 3.490. The petitioner claims that, under the old rules, instructing on lesser degree homicides not supported by the evidence invited jurors to disregard their oaths at the guilt-innocence phase and arbitrarily find guilt of a lesser degree in some cases but not in others, depending upon whether they felt the death penalty was an inappropriate sentence. *See Roberts v. Louisiana*, 428 U.S. 325, 334-36, 96 S.Ct. 3001, 3006-07, 49 L.Ed.2d 974 (1976) (invalidating Louisiana statute that mandated death penalty whenever jury returned a guilty verdict of first degree murder). Under Florida's bifurcated procedures, however, a death sentence does not automatically follow a verdict of guilty in the first degree. As the jury in this case was expressly instructed, a separate sentencing hearing must be held and an advisory verdict rendered. Therefore, even under the old rules, jurors in Florida who were inclined to dispense mercy were not faced with the necessity of finding a lesser degree at the guilt-innocence stage in order to avoid ultimately imposing the death penalty. *See Hitchcock v. Wainwright*, 745 F.2d 1332, 1341-42 (11th Cir. 1984), *vacated*, 745 F.2d at 13[illegible] (pending en banc review). The possibility that in another case the jury could, under similar circumstances, find a particular defendant guilty of a lesser degree of homicide and thus preclude any consideration of the death penalty for that defendant does not mean the petitioner in the present case was sentenced to death arbitrarily. The sentencing phase of the petitioner's trial afforded him full opportunity to present mitigating evidence and pleas for mercy. Nevertheless, the jury recommended the death penalty. Not having been prejudiced by the instruction, the petitioner cannot claim that the outcome of his case would have been different had his attorney raised an objection.

Third, from a review of the record it is evident that the attorney did not fail to develop and present in mitigation evidence of the petitioner's mental condition at the time of the murder. As noted by the district court below, several witnesses, including a psychiatrist, testified in relation to the petitioner's state of severe emotional stress. Accordingly, the trial court found as one of three mitigating factors that the murder had been committed while the petitioner was under the influence of extreme mental or emotional disturbance. Clearly, then, the petitioner's attorney provided reasonably effective assistance of counsel on this issue.

Fourth, the attorney did not unreasonably fail to object to the instruction at sentencing on the basis that the trial court had neglected to inform the jurors of their ability to recommend life imprisonment even if mitigating factors did not outweigh aggravating factors. The petitioner claims the instructions incorrectly implied that, in order for the jury to recommend a life sentence, it would have to find mitigating factors to outweigh whatever aggravating factors it found to exist. *See Morgan v. Zant*, 743 F.2d 775, 779 (11th Cir.1984) (dicta). In actuality, however, the sentencing instructions given in this case neither expressly nor implicitly foreclosed the jury's ability to exercise mercy and recommend a life sentence even though no mitigating factors were present. To the contrary, after listing and defining the statutory aggravating factors enumerated in Florida's capital punishment statute, and *before* listing possible mitigating factors and describing their function generally, the trial court stated that the jurors were duty-bound to recommend a sentence of life imprisonment if, in their opinion, the aggra-

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Cite as 764 F.2d 1369 (1985)

ing factors found were not "sufficient" justify imposing the death penalty. st sufficient aggravating factors must ist before the death penalty could even considered an appropriate sentence, ereby triggering the jury's consideration f mitigating evidence, was made clear by ree additional references to this require- ent elsewhere in the instructions. In sum, the sentencing instructions the trial ourt gave in this case would encompass the broadest exercise of a jury's discretion in mercifully recommending a life sentence. There simply was no such exercise of discretion here. *See Tucker v. Zant*, 724 F.2d 882, 891–92 (11th Cir.1984); *Westbrook v. Zant*, *supra*, 704 F.2d at 1502–03. Since the instruction was adequate, the failure of the petitioner's attorney to object did not deprive him of effective assistance of counsel.

Fifth, the attorney's failure to object to a jury instruction which listed aggravating factors not supported by any evidence did not prejudice the outcome of the petitioner's sentencing proceeding. The trial court enumerated all aggravating factors set forth in Florida's capital punishment statute. The petitioner claims this may have caused the jury to conclude that factors not supported by the evidence in fact existed. This claim is without merit. The jury is presumed to have followed the trial court's express instructions that each aggravating factor found and relied upon in recommending the death penalty be proved beyond a reasonable doubt and that only the evidence presented at the sentencing hearing be considered. The simple assertion that the court's listing of aggravating factors not supported by the evidence made these factors *appear* to be present and thus misled the jury into concluding that they were indeed present fails to overcome this strong presumption. Since the instruction itself did not result in prejudice, the attorney's failure to object did not constitute ineffective assistance.

Finally, the attorney's failure to object to an instruction which omitted the statement that a tie vote among jurors would mandate a recommendation of life imprisonment did not prejudice the outcome of the sentencing proceeding. A similar claim was rejected by this Court in *Henry v. Wainwright*, 743 F.2d 761, 763 (11th Cir. 1984), because the defendant could not show that the jury was ever equally divided. Likewise, the petitioner here has not established that the jury was in fact split six-to-six. Bound by precedent, we hold that the instruction did not alter the outcome of the petitioner's sentencing proceeding and therefore no prejudice resulted from the attorney's failure to object.

The denial of petitioner's petition for writ of habeas corpus is AFFIRMED.

Jack Howard POTTS,
Petitioner-Appellee,
Cross-Appellant,

v.

Ralph KEMP, Warden, Georgia Diagnostic and Classification Center,
Respondent-Appellant, Cross-Appellee.

No. 83-8067.

United States Court of Appeals,
Eleventh Circuit.

June 21, 1985.

Petitioner whose conviction of aggravated assault, kidnapping with bodily injury, and armed robbery had been affirmed, 241 Ga. 67, 243 S.E.2d 510, appealed from an order of the United States District Court for the Northern District of Georgia, 492 F.Supp. 326, dismissing his federal habeas petitions. The Court of Appeals, 638 F.2d 727, affirmed in part, and vacated and remanded in part, and denied rehearing, 642 F.2d 1210. The District Court, Charles A. Moye, Jr., Chief Judge, 575 F.Supp. 874, granted relief. On appeal, the Court of Appeals, 734 F.2d 526, affirmed. On State's petition for rehearing, the Court of

NO. 85-5815

IN THE

SUPREME COURT OF THE UNITED STATES

AUDREY DENNIS ADAMS,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, and
JIM SMITH

Respondents.

CERTIFICATE OF SERVICE

I, MARGENE A. ROPER, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the Respondent's Brief in Opposition to the Petition for Writ of Certiorari to the Court of Appeals for the Eleventh Circuit, and the Appendix in the above case on counsel for the petitioner, by depositing same in the United States mail, first class mail, postage prepaid, addressed as follows:

Kenneth R. Hart, Esq.
Timothy B. Elliott, Esq.
Jan Johnson, Esq.
Ausley, McMullen, McGehee
Carothers & Proctor
Post Office Box 391
Tallahassee, Florida 32302

All parties required to be served have been served.

Done this 6th day of December, 1985.

MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave.
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

SUPREME COURT OF THE UNITED STATES

AUBREY DENNIS ADAMS, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85–5815. Decided January 13, 1986

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Because the Court's refusal to grant certiorari in this case allows the State of Florida to proceed with the execution of a defendant whose conviction may well rest upon a ground that the Florida Supreme Court has held invalid, I must dissent from the denial here.

Since *Stromberg* v. *California*, 283 U. S. 359 (1931), this Court has recognized that "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." *Zant* v. *Stephens*, 462 U. S. 862, 881 (1983). See *Chiarella* v. *United States*, 445 U. S. 222, 237, n. 21 (1980); *Leary* v. *United States*, 395 U. S. 6, 31–32 (1969). Although in *Stromberg*, the Court was concerned that the jury might have held the defendant criminally liable for conduct protected by the First Amendment, the rationale of that decision should not be limited to

cases in which a general verdict may be based upon a ground repugnant to the Federal Constitution. Where a jury has been instructed that it may convict a defendant upon an invalid ground, the reason for that invalidity is not important. See *Chiarella* v. *United States*, *supra*, at 237, n. 21 ("We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct.") What offends the Due Process Clause is the possibility that the jury may have condemned the defendant for reasons that as a matter of law—be it statutory or constitutional—cannot support the verdict. The existence of such a possibility is all too real in this case and demands that petitioner's conviction be set aside.

Petitioner was arrested and charged with the murder of an eight-year-old girl. In statements to the police, he admitted removing the victim's clothes, using rope to tie her hands, and placing plastic bags over her body. He said he thought he had tried to have sexual relations with the victim but either could not do it or could not bring himself to do it. 764 F. 2d 1356, 1358 (CA11 1985). The indictment brought against petitioner alleged that he had "murdered the victim, unlawfully, from a premeditated design by strangling." 412 So. 2d 850, 852 (Fla. 1982). The circumstances of the crime might easily have led jurors to believe that even if petitioner had not premeditated the homicide, he nevertheless had killed the girl in the course of an attempted rape. Under state law, such a felony murder theory was not foreclosed by the indictment, *id.*, and it does not appear that the prosecution ever indicated its intention to rely solely upon a theory of premeditated murder.

The trial court's instruction made clear the availability of either felony murder or premeditated murder as a basis for a first-degree murder conviction. At the close of trial, the court instructed the jury that it would not have to find that petitioner had a "premeditated design to kill" in order to convict him of first-degree murder. The court explained:

"The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree, even though there is no premeditated design or intent to kill.

If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, or while escaping from the immediate scene of such crime, the killing is in the perpetration of or in the attempt to perpetrate such arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping and is murder in the first degree." App. to Pet. for Cert. A–7.

The jury proceeded to convict petitioner of first-degree murder. Long before petitioner's trial, however, the Florida Supreme Court had held the statutory term "crime against nature" too vague to sustain a conviction. *Franklin* v. *State*, 257 So. 2d 21 (Fla. 1971). Indeed, in affirming petitioner's conviction, the Florida Supreme Court admitted that the instruction here "included references to two crimes which do not exist, to wit: rape and an abominable and detestable crime against nature." 412 So. 2d, at 852. Were it possible, therefore, that in reaching their general verdict the jury relied on a felony-murder theory based upon the sexual aspects of the killing, the conviction unquestionably would have to be overturned under *Stromberg*.

Finding no such possibility, the Court of Appeals affirmed the District Court's refusal to grant petitioner's habeas petition. The Court of Appeals concluded:

"The trial court's reference to the capital felony of killing during the commisssion of or an attempt to commit rape, a crime against nature, or kidnapping as murder in the first degree appears early in the instructions as part of what were, in essence, statutory definitions. The actual and controlling charge came later in the instruc-

> tions, when the trial court told the jurors that, if the elements of homicide were found, their next task would be to determine its degree. At this point, premeditated murder was the only killing stated to constitute murder in the first degee. Therefore, the jurors were actually instructed to consider only premeditated murder as murder in the first degree." 764 F. 2d, at 1356.

I cannot accept the Court of Appeals' distinction between the "statutory" section of the trial court's instructions and the later, "controlling" part. Although the trial court's focus on premeditated murder came in the context of its "summary" of the entire charge, the jury can hardly be presumed to have forgotton the lengthy explanation of first-degree murder that had come before. The sexual overtones of the crime make it impossible to eliminate the possiblity that the jury seized upon the references to rape and "crime against nature" and made them dispositive here. So long as such a possiblity exists, *Stromberg* requires that petitioner's conviction be set aside.

This Court's refusal to grant certiorari in *Dobbert* v. *Wainwright*, —— U. S. —— (1984), a case raising a *Stromberg* claim very similar to the one here, might have been attributed to the majority's belief that the constitutional claim there had not been properly preserved. *Id.*, at —— (MARSHALL, J., dissenting from denial of stay of execution and of certiorari). No such procedural bar exists here, and the Court's refusal to consider petitioner's claims is even less excusable. I dissent.